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RECORD. CASE NO. 15057.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1087~~. 758

JOHN BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JUNE 18, 1892.

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1 United States of America, western district of Arkansas. In the circuit court, Feb'y term, A. D. 1892.

UNITED STATES }
vs. } Murder.
JOHN BROWN. }

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present;

That John Brown, a white man and not an Indian, on the 8th day of December, A. D. 1891, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Josiah Poorboy then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said John Brown with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he the said John Brown in his hand then and there had and held, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot off, to, against and upon the said Josiah Poorboy, and that the said John Brown, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Brown discharged and shot off as aforesaid, then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate, and wound him the said Josiah Poorboy in and upon the right side of the breast of him the said Josiah Poorboy, giving to him the said Josiah Poorboy then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun
2 aforesaid by the said John Brown in and upon the right side of the breast of him the said Josiah Poorboy one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said Josiah Poorboy, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Brown him the said Josiah Poorboy in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

3 *2nd count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas, aforesaid, upon their oath present:

That John Brown, a white man and not an Indian, on the 8th day of December, A. D. 1891, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Thomas Whitehead, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said John Brown, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun he the said John Brown in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Thomas Whitehead, and that the said John

Brown, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Brown, discharged and shot off as aforesaid, then and there, feloniously, wilfully and of his malice aforethought, did strike, penetrate, and wound him the said Thomas Whitehead in and upon the right side of the breast of him the said Thomas Whitehead, giving to him the said Thomas Whitehead, then and there, with the leaden bullet aforesaid, so as aforesaid dis-
4 charged and shot out of the gun aforesaid, by the said John Brown, in and upon the right side of the breast of him the said Thomas Whitehead, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound, he the said Thomas Whitehead then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Brown him the said Thomas Whitehead; in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Indorsed:) No. 40, United States vs. John Brown, murder. A true bill, Lewis R. Hawkins, foreman. Witnesses: Lord. W. Shirley, lives 15 miles NE. Tahlequah, I. T.; Anna Hitchcock, lives 15 mi. NE. Tahlequah, I. T.; Sam. Manus, lives 15 mi. NE. Tahlequah, I. T.; Mary Manus, lives 15 mi. NE. Tahlequah, I. T.; Frank Hamilton, lives 13 mi. east of Tahlequah, I. T.; Walter Shirley, lives 12 mi. SE. Tahlequah, I. T.; E. H. Bruner, lives Silome Springs, Ark.; Thos. Caywood, lives 10 mi. west Silome Sp'gs., Ark.; Wm. Sullivan, lives 15 mi. NE. Tahlequah, I. T.; Annie Shirley, lives 15 mi. NE. Tahlequah, I. T. Filed February 16, 1892, Stephen Wheeler, clerk. By J. M. Dodge, D. C.

John Roach, 15 mi. NE. of Tahlequah, I. T.; Chas. Lamb, lives at Tahlequah, I. T.; Dave Rinks, lives 15 mi. E. of Tahlequah, I. T.; Florence Blivins, 15 mi. NE. Tahlequah, I. T.; Brown Hitchcock, Vinita, I. T.

5 In the circuit court of the U. S. for the western district of Ark.
February term, 1892.

TUESDAY MORNING, *Feb. 16th, A. D.* 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
JOHN BROWN. } Indictment for murder, No. 40.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, and having had

hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

MARCH 18TH, 1892.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas; and come the said defendant in custody of the marshal, and by his attorneys, C. J. Fredrick, esq., and Geo. A. Grace, esq., and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn by the jury commissioners for the present term of this court, more than two entire
6 days heretofore; and the said defendant had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined, whereupon the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause, to wit:

John A. Bankes, Francis M. Barrick, Sam'l W. Calhoun, James A. Daniels, Harris H. Davis, Hugh McClure, Nelson S. Parker, Wm. D. Reed, Chas. F. Ross, Andrew J. Ray, Wm. S. Williams, John Wear, twelve good and lawful men of the district aforesaid duly *duly* selected, empaneled, and sworn to try the issue joined and a *tra* true verdict render according to the law and the evidence; and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause they were put in the charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and baliff in charge until discharged by order of this court.

MARCH 21ST, 1892.

It having come to the knowledge of the court that the court room is desired on Tuesday, the 22nd inst., by the Government for the purpose of holding a civil-service examination, it is hereby ordered that the circuit and district courts of the United States for the western district of Arkansas be held on Tuesday, the 22nd inst., and as long thereafter as
7 the civil-service examination shall require the United States court room for a civil-service examination, at the circuit court room of the court-house in Fort Smith, Upper Township, Sebastian County, Arkansas.

MARCH 22ND, 1892.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas; and come the said defendant in custody of the marshal and by his attorneys, C. J. Fredrick,

esq., and Geo. A. Grace, esq., and now come the jury heretofore empaneled for the trial of this cause in charge of a baliff of this court, to wit:

* * * * * * *

who took their seats in the jury box, and after hearing the balance of the argument of counsel and receiving the charge of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict, and after a short time returned into court the following verdicts, to wit:

1st count. We, the jury, find the defendant guilty of murder as charged in the first count of the within indictment.

(Signed) H. H. DAVIS,
Foreman.

2nd count. We, the jury, find the defendant guilty of murder as charged in the second count of the within indictment.

(Signed) H. H. DAVIS,
Foreman.

Whereupon the jury was by the court discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await final sentence.

8 MARCH 25TH, 1892.

On this day come the defendant, by his attorneys, and files his motion to set aside the verdict of the jury and for a new trial in this cause, and motion in arrest of judgment.

APRIL 30TH, 1892.

On this day come on to be heard the joint motions heretofore filed to set aside the verdict of jury and for a new trial in this cause and for arrest of judgment in this cause; and the court being well and sufficiently advised in the premises, doth overrule said motions.

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, John Brown, was brought to the bar of the court, in custody of the marshal of said district, and it being demanded of him what he has or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 22nd day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it *it* is considered by the court that the said marshal of the district aforesaid cause the said John Brown to be taken hence and him, the said John Brown, safely and securely keep, from this date hereof, until Tuesday, the 28th day of June, A. D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock
9 in the afternoon of the said day the said marshal cause the said John Brown to be taken to some convenient place within this district, and then and there between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Brown to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all of their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, order, which shall be returned by the said marshal with a full and true account of the execution of the same.

Ordered by the court that sentence be suspended against the defendant in this cause for the killing of Josiah Poorboy as charged in the 1st count of the indictment.

10 *Bill of exceptions.*

UNITED STATES
vs.
JOHN BROWN. } Murder.

Be it remembered that on the trial of this case, after a panel of 37 jurors was selected and qualified in this cause, the court ordered the clerk to furnish a list of the names of the 37 jurymen to the counsel for the defendant and to the district attorney, respectively. And said counsel were directed and ordered by the court to make their respective challenges, each side from the lists furnished by the clerk as aforesaid, without allowing the defendant's counsel to see or be informed of the names of the jurors on said list challenged by the district attorneys, to which order of the court the counsel for the defendant objected, but the court overruled said objection, to which ruling of the court the defendant at the time excepted.

Whereupon the challenges of each side were made by the respective counsel and the lists of the district attorney returned to the clerk, which lists showing the names challenged and those not challenged by the district attorney is as follows:

11 *List of petit jurors summoned and in attendance at the February term, A. D. 1892, of the district and circuit courts of the United States for the western district of Arkansas, which was begun and held at Fort Smith, in said district, on the 1st day of February, 1892.*

1	[Samuel H. Britts]*	Carroll County	
2	John A. Bankes	Benton	"
3	Francis M. Barrick	Franklin	"
4	Allen Bobo	Crawford	"
5	Albert Bunch	Sebastian	"
6	[Clement C. Boison	Sebastian	"]† (G.)
7	[William Carlton*]	Newton	"
8	Samuel W. Calhoun	Washington	"
9	Simon W. Cooper	Crawford	"
10	[Charles E. Crawford]*	Madison	"
11	[David H. Creekmore]*	Crawford	"
12	[Silas M. Carney]*	Crawford	"
13	[James F. Crocker]*	Johnson	"
14	James A. Daniels	Benton	"
15	Harris H. Davis	Washington	"
16	William A. Douglas	Sebastian	"
17	Martin East	Sebastian	"
18	Henry H. Epperson	Crawford	"
19	Richard Johnson	Franklin	"
20	Perry Keyser	Benton	"

* Stricken out with red ink.
† Stricken out with black ink.

21	Hugh McClure	Carroll County	
22	[James D. McGregor]*	Marion	"
23	Geo. W. McCaslin	Washington	"
24	[John H. Morris]*	Newton	"
25	[John J. Oliver]*	Sebastian	"
26	Nelson S. Parker	Scott	"
27	[James E. Parker]	Boone	"
28	William D. Reed	Madison	"
29	[William Reeves]*	Montgomery	"
30	Charles F. Ross	Sebastian	"
31	Andrew J. Ray	Sebastian	"
32	William A. Ross	Sebastian	"
33	[Henry M. Tate	Sebastian	"]† (G.)
34	[Martin F. Tygart]*	Benton	"
35	Richard Turner	Crawford	"
36	Wm. F. Williams	Madison	"
37	John Wear	Polk	"

ALTERNATES.

1	Lewis Bolin	Sebastian County	
2	James B. Blakely	"	"
3	[John Ulmer	"	"]† (G.)
4	Richard H. Ravenecroft	"	"
5	Moses Hargell	"	"
6	Owens Miller	"	"
	Jerry Harlen	Ft. Smith	
	[Geo. T. Morris	do.	]† (G.)
	[Henry Routsel	do.	]† (G.)
	Thomas Trotter	do.	
	Geo. Lindsay	do.	
	Henry Whitehead	do.	

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of district and circuit courts of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and correct list of the petit jurors summoned and in attendance at the Feb'y term, A. D. 1892, of said court.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this day of February, A. D. 1892.

, *Clerk*,

By , *D. C.*

12 And at the same time the defendant's list, showing his challenges and those not challenged, was returned to the clerk, which said list is as follows:

13 *List of petit jurors summoned and in attendance at the February term, A. D.* 1892, *of the district and circuit courts of the United States for the western district of Arkansas, which was begun and held at Fort Smith, in said district, on the* 1st *day of February,* 1892.

	1 [Samuel H. Britts]*	Carroll County	
	2 John A. Bankes	Benton	"
	3 Francis M. Barrick	Franklin	"
(D)	4 [Allen Bobo	Crawford]†	"
(D)	5 [Albert Bunch	Sebastian]†	"
	6 Clement C. Boison	Sebastian	"
	7 [William Carlton]*	Newton	"
	8 Samuel W. Calhoun	Washington	"
(D)	9 [Simon F. Cooper	Crawford]†	"

* Stricken out with red ink.
† Stricken out with black ink.

	10	[Charles E. Crawford]*	Madison County
	11	[David H. Creekmore]*	Crawford "
	12	[Silas M. Carney]*	Crawford "
	13	[James F. Crocker]*	Johnson "
	14	James A. Daniels	Benton "
	15	Harris H. Davis	Washington "
(D)	[16	William A. Douglas	Sebastian]† "
(D)	[17	Martin East	Sebastian]† "
(D)	[18	Henry H. Epperson	Crawford]† "
(D)	[19	Richard Johnson	Franklin]† "
(D)	[20	Perry Keyser	Benton]† "
	21	Hugh McClure	Carroll "
	22	[James D. McGregor]*	Marion "
(D)	[23	Geo. W. McCaslin	Washington]† "
	24	[John H. Morris]*	Newton "
	25	[John J. Olliver]*	Sebastian "
	26	Nelson S. Parker	Scott "
	27	[James E. Parker]*	Boone "
	28	William D. Reed	Madison "
	29	[William Reeves]*	Montgomery "
	30	Charles F. Ross	Sebastian "
	31	Andrew J. Ray	Sebastian "
(D)	[32	William A. Ross	Sebastian]† "
	33	Henry M. Tate	Sebastian "
	34	[Martin F. Tygart]*	Benton "
(D)	[35	Richard Turner	Crawford]† "
	36	Wm. F. Williams	Madison "
	37	John Wear	Polk "

ALTERNATES.

(D)	[1	Lewis Bolin	Sebastian County]†
(D)	[2	James B. Blakely	" "]†
	3	John Ulmer	" "
	4	Richard H. Ravencroft	" "
(D)	[5	Moses Harrell	" "]†
(D)	[6	Owens Miller	" "]†
(D)	[	Jerry Harlan	Ft. Smith]†
		Geo. T. Morris	do.
(D)	[	Henry Routsel	do.]†
(D)	[	Thomas Trotter	do.]†
(D)	[	Geo. Lindsay	do.]†
(D)	[	Henry Whitehead	do.]†

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of district and circuit courts of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and correct list of the petit jurors summoned and in attendance at the Feb'y term, A. D. 1892, of said court. In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this day of February, A. D. 1892.

, *Clerk*,
By , *D. C.*

14 By which said lists it appears that Henry Reutzel, a juryman on said lists, was challenged by both sides.

Whereupon the defendant renewed the objection to the order of the court requiring the challenges to be made in the way and method aforesaid, and objected to the jury so selected; but the court overruled both

* Stricken out with red ink.
† Stricken out with black ink.

objections, and ordered the jury so selected to be called and sworn to try the case, which was accordingly done, to all of which the defendant at the time excepted.

Whereupon the United States to maintain the issues on its part introduced and examined the following-named witnesses:

Lord Wellington Shirley, Thomas Caywood, William Sullivan, Frank Hamilton, Charles Lamb, E. H. Bruner, Walter Shirley, Mr. Brown Hitchcock, Sam Manus, John Roach, who testified respectively as follows:

15 In the circuit court of the United States within and for the western district of Arkansas, February term, 1892:

UNITED STATES
vs.
JOHN BROWN. } Murder.

Transcript of the testimony.

Before his honor Isaac C. Parker and a jury.

Appearances: For the United States, William H. H. Clayton, U. S. dist. att'y; for the defendant, Messrs. Geo. A. Grace and C. F. Frederick.

Trial held at Ft. Smith, Ark., commencing March 18th, 1892.

16 LORD WELLINGTON SHIRLY, having been duly sworn upon behalf of the Government, was examined by the district attorney, Wm. H. H. Clayton, and testified as follows, to wit:

Question. Where do you live?

Answer. I live in the Cherokee Nation, Talequah district.

Q. You are the district judge there, are you not?

A. Yes, sir.

Q. Do you know the defendant, John Brown?

A. Yes, sir; slightly; I have no personal acquaintance with him; I never saw him at all to know him until after this circumstance took place of the killing of these men at my place.

Q. Did you know Poorboy and Whitehead?

A. Yes, sir; I knew them.

Q. What was Poorboy's first name?

A. Josiah, and Whitehead's name was Thomas. I had a short acquaintance with Whitehead; I had only been acquainted with him about 10 days before he was killed.

Q. Was he a white man or an Indian?

A. White man.

Q. What was Poorboy?

A. He was a Cherokee Indian.

Q. The defendant Brown is a white man?

A. Yes, sir; said to be. I was well acquainted with Poorboy.

Q. Whitehead was a white man that you were not so well acquainted with?

A. No, sir; I hadn't any acquaintance with him. That is, I had no long acquaintance with him.

Q. When did you first get acquainted with Whitehead?

A. He came to my house about a week before he was killed.

Q. What was his business?

A. He claimed to be a United States detective. And Mr. Jim
17 Craig, they had him under arrest in the possession of a marshal, Charley Lamb, and they had arrested him there in a quarter of a mile of my house, at Mr. Hitchcock's—at my daughter's, and they carried him to Tahlequah, and he got away from them, and they heard of him now coming back to the same place they arrested him——

Mr. FREDERICK (of counsel for defendant). Do you know of these things of your own knowledge, or did you just hear of them? You did not go with them to Talequah, or wasn't at your daughter's when he was arrested?

The WITNESS. No, sir; I heard that he got away, and Whitehead came there to see if he could get him again.

The DISTRICT ATTORNEY. Whitehead was looking for him?

A. Yes, sir; that was his business.

Q. That is what Whitehead was doing at your house?

A; Yes, sir; that was his business, he told me—in fact, he came with me from Telequah on the same day.

Q. How long had he been at your house?

A. He had been there four days before he was killed.

Q. What day was he killed?

A. He was killed on Tuesday night.

Q. Do you remember the day of the month?

A. 8th day of December, as well as I remember.

Q. Of what year?

A. Of 1891.

Q. The 8th of December, as I see by an almanac, was on Tuesday. He had been there about four days?

A. Yes, sir; he came with me on about the 4th. It was on Friday he came with me from Talequah; he came home with me.

Q. Friday was the fourth, as I see by this almanac. He staid at your house the remainder of the time?

18 A. Yes, sir—well, after he came in on Friday he went around to the neighbors up to the day he was killed.

Q. Please state if Poorboy was at your house the night of the killing.

A. He came to my house on the 8th, Tuesday, with Mr. Hitchcock.

Q. What time in the day?

A. Late in the evening; just about dusk.

Q. What was his business there?

A. Mr. Hitchcock had gone to Talequah for a doctor for my son, who was very sick, and he did not get any doctor, but came with some medicine, and Mr. Poorboy came with him, and went on up to my son's. This was just about dusk when they passed. They did not get down at my house—that is, Mr. Poorboy didn't; Mr. Hitchcock did just a minute, and came in and told my wife the news that he had not got any doctor, and they went on up to my son's about dusk, and Poorboy came back a little after.

Q. Do you know why he came over there from Talequah?

A. Well, I will go on to tell you. When he come back he just come in; I had gone to bed; they passed by about dusk we will say; when he came back I had gone to bed, and he walked in and said, "Have any of them boys come yet?" And I said, "What boys?" and he said, "There is a crowd to meet me here to-night and we are going to look out for Jim Craig."

Mr. GRACE (of counsel for defendant). We object to that.

The DISTRICT ATTORNEY. Do not state what he said. You can state that he informed you that he was to meet some persons to look for Craig, if that is true.

19 A. Yes, sir; that is what he said. He did not call no names. He said there was a lot of boys to be around there that night to look out for Jim Craig.

Q. Where did Poorboy live?

A. I don't know whether he had any permanent home or not. He was a guard at Talequah under the control of the sheriff.

Q. Who was the sheriff?

A. Paris.

Q. When Poorboy came to your house about what time was it when he got there?

A. Well, it was something about 7:00 o'clock, I reckon. I had a clock, but I didn't notice the time. I had gone to bed. I laid down early; I had been worrying with my son, you know.

Q. Where was Whitehead when he came?

A. Laying in the room in bed.

Q. Please state if they went to bed at your house.

A. Well, Whitehead was already gone to bed, and when Poorboy came in and asked this question about these men, whether they had come or not, and I told him I didn't suppose anybody has come here——

Q. Never mind the conversation. Just state if you put him to bed.

A. I told him, you had better put up your horse and go to bed, and he set a little while, and he said, "I believe I will," and I didn't get up at all, and he went and put up his horse, and came back and told me then he would go to bed, and I told him where to go to bed; went in a separate room where Whitehead was, and there is an ell running off south from the house, and me and my old woman were in that room, and then there was a big middle door here that went into the room where they were lying, and that room they occupied was next to the road.

20 Q. Your room was back of that?

A. Yes, sir.

Q. An ell, was it not?

A. Yes, sir.

Q. You may go on and state from there what occurred.

A. He went in. I took a lamp in for him, and I don't know how long he set up in there. And Whitehead was in the bed, and I told him to take charge of the room now, and I said, "You can put out the lamp if you wish, when you lie down," and I went in my room, and, I reckon, went to sleep. I don't know how long I had been to sleep, but this shooting wakened me up.

Q. You went to bed and went to sleep, and was awakened by some shooting.

A. Yes, sir; by the report of the guns; such a clap it woke me up, but I didn't get up. My wife got up and went to a glass window, and I asked her what in the world was the matter, and she says, "I can't see anything." I said, "Do you hear anything?" And she said, "No, I don't hear anything at all any more than I thought I heard one of these men that was in the room say, 'Tell them yes.' I didn't hear anything further."

Mr. FREDERICK (of counsel for defendant). We object to that.

The COURT. You need not tell anything your wife told you.

The DISTRICT ATTORNEY. Was that right at the time of the shooting?

A. A little before that she heard that.

Q. It was right at the time of the shooting you were talking about this?

A. Yes, sir; just after it happened.

The DISTRICT ATTORNEY (to the court). I think that is a part of the transaction. (To the witness.) What did you do then?

A. I just laid still.

The COURT. I do not think it would hardly be competent to state her conversation.

21 The WITNESS. I just laid still after that and everything quieted down, and I told my wife—I said, "I will get up and see if these men are in the room." I got up and opened the door and went in, and put my hand on the bed where they were lying and they were gone. I ventured out on the porch—I have got a considerable of a building and a long porch—I could not see anything; and I ventured out to the gate ten steps from the porch, and I found a body down the road, and I ventured out a little further and I saw another one. I went up close enough to see it was two dead bodies. I went up in about 30 or 40 feet of them, I guess, and I saw it was two dead men, and I just went back in the house and didn't go out any more that night. I staid in the house until about the break of day, and I got up, and we have a little boy there with us, and that was all there was at home—just me and my wife and the little boy, and a little grand-baby, a little girl. And I sent this little boy up to my son's to tell Brown Hitchcock what had happened, and Mr. Barker lived about 2 0 yards of my place, and I sent for him to come down, and then I rode around and told the neighbors to come in. Mr. Sullivan and my son John, and Bob Roots, I think, all came in, and Mr. Sullivan was the first one that come, and he said——

The DISTRICT ATTORNEY. Never mind what he said. What did you find?

A. He come up and looked at these men, and went in the house and set down.

Q. You found the two men out there after your neighbors came in?

A. Yes, sir.

Q. Were they dead or alive?

A. Dead.

Q. Who were they?

22 A. One was Thomas Whitehead and the other was Josiah Poorboy.

Q. The two men who went to bed in your room that night?

A. Yes, sir.

Q. Were there any arms upon them?

A. No, sir; none at all.

Q. What arms did they have, if any, when they came?

A. I didn't see but one. I seen a Winchester that Poorboy had; I did not see the pistol.

Q. Did Whitehead have any arms?

A. No, sir; he didn't have any gun; he might have had a pistol, I didn't see it. He staid there three or four days, but I never saw a pistol.

Q. You never saw any arms upon him?

A. No, sir.

Q. Poorboy had a Winchester?

A. Yes, sir.

Q. Please state if that was gone.

A. Yes, sir.

Q. There were no arms in the room, nor about the two dead men?

A. No, sir; none at all.

Q. When you went out in the morning and saw them, how were they lying and where?

A. Whitehead was lying right on his back, a bullet hole right in his forehead, and another hole in his neck, and in Poorboy I took it to be a bullet hole about his upper lip here; he had a great deal of beard, and a heap of blood, I could not tell good, but he had a bullet hole, I think, right there.

Q. Anywhere else on his body?

A. We didn't examine him any further there.

Q. Were there any other bullet holes on his body?

A. I seen some on his clothes, but didn't see any in the body further.

Q. Where?

Q. I saw a bullet hole about in here somewhere (indicating in right breast), and another in his coat sleeve. I could not describe them accurately.

23 Q. Do you know how many bullet holes they had on them?

A. No, sir; I do not.

Q. How was Whitehead besides these two?

A. That is all I saw; them two.

Q. Did you look for others?

A. No, sir.

Q. Do you know whether he had any others upon his person or not?

A. No, sir.

Q. How were they lying?

A. Whitehead was lying on his back, just stretched out, hands and feet, and Poorboy was lying on his right side with his left arm in this kind of a shape, and his legs a little drawn up like you would lie down, and——

Q. How was his coat?

A. His coat was doubled up under him, behind him, somehow or other, kind of ruffled some way or another.

Q. Did he have his belt on?

A. No, sir.

Q. Did he have any when he came there?

A. I don't know now about the belt; I don't recollect seeing that. I only saw him with the Winchester.

Q. How far from your gate were they lying?

A. Just forty steps. I stepped it.

Q. Was Whitehead lying in the road, or out of it?

A. Out of it. Poorboy was lying right in the road, and Whitehead just ten steps from him out of the road. I have a garden here, and right up here between the road and the garden place is where they was lying, both of them 40 steps from the gate.

Q. Lying there dead?

A. Yes, sir; both dead.

Q. What did you do with them?

A. When all these neighbors came in, I ask what we had better
24 do with them, and Mr. Sullivan said, "I will go on to Tahlequah and report, and send a wagon after them; you have your team hitched up to your wagon, and get these bodies and take them and put in it and start on with them," and they did so. And as they were going on they met the hack coming after them.

Q. What time was this firing?

A. After I had went out and seen the dead bodies, just as I stepped in the room my clock struck ten; I don't know whether the time was correct or not.

Q. Did you see any tracks around there or marks of blood?

A. I saw blood, but could not see any tracks. It was cold, and the ground was frozen hard; didn't make any tracks.

Q. Where did you see the blood?

A. Right there where these bodies were lying.

Q. Did you trail them any?

A. Yes, sir; this old gentleman I speak of coming down, Mr. Barker was looking around; we had built up a fire; it was a very cold morning, he was looking around when it got light enough for him to see, and he said, "There has been a horse or somebody else shot here; there is plenty of blood;" and I and him went and looked and we trailed this blood on about 50 yards before we quit it, and it still went on.

Q. In what direction?

A. Down in the direction of Mr. Hitchcock's.

Q. How far did Hitchcock live from you?

A. Near about a quarter.

Q. Mrs. Hitchcock is your daughter?

A. Yes, sir.

Q. Was this trail of blood right in the big plain wagon road?

A. Yes, sir; went right down that way.

Q. Did you know anything about Roach being shot?

A. I didn't until Mr. Sullivan came up and said, "Roach——

Q. Never mind what he said.

25 A. I went to see him the next morning.

Q. Where did you find him?

A. At Mrs. Hitchcock's.

Q. Was he wounded?

A. Yes, sir.

Q. Where?

A. Right in the right arm; shot in the arm, and it came out right centrally under there, and struck his side, and the ball dropped down.

Q. You say this trail of blood went from where the shooting occurred right down towards Mrs. Hitchcock's, and you went there the next morning, and found this man Roach there wounded?

A. Yes, sir; I found him there. And this blood went right from Mr. Whitehead's head—the blood was altogether there—and that blood just left there from Whitehead's head, and it looked like it all came out of one man from its appearance, right there.

Q. The blood went from the head of Whitehead on down?

A. Yes, sir; I noticed it particularly. It looked like it all came out of that man; I don't reckon it did.

Q. Where was Poorboy's horse?

A. He put his horse in my barn, a log building, 80 yards from where these bodies were lying; he just tied him to a trough; and when they got ready to start next morning to these bodies there was a remark made about the horses, and I said I would go and bring over the horses while they were fixing up the wagon getting ready to start, and I went over and took hold of the horse's rope; he was tied to a trough, and brought him over and they took charge of him and took him off; and the next day I went down to town——

Q. Was the horse shot?

A. I did*n*'t know it until I got to town, as I was going to tell
26 you; and the sheriff asked me how that horse got shot.

Mr. GRACE (of counsel for defendant). Don't state that.

The DISTRICT ATTORNEY. Did you see the horse?

A. Yes, sir.

Q. Where was he shot?

A. In the neck—just a little flesh mark. It looked like he might have had his neck in this position—it must have been doubled somehow or other.

Q. That was Poorboy's horse?

A. That was the one he was riding.

Q. You took him from the stable the next morning?

A. Yes, sir.

Q. Did you see anything that day or night of Wacoo Hampton or this defendant?

A. No, sir; nothing at all.

Q. Did you see them the next day?

A. No, sir.

Q. Did you see them afterwards?

A. No, sir; I never saw them any more at all, until I saw the defendant, and this man Bill Tatum, I believe, arrested and chained together.

Q. You never saw the defendant until after his arrest?

Q. Have you ever seen Wacoo Hampton since?

A. No, sir; he ——

Q. He is dead?

A. Yes, sir; I suppose. I never saw him at all; he was killed there within a mile of my house, but I didn't go to see him.

Q. This occurred in the Cherokee Nation, how far from Tahlequah?

A. Well, some call it 10, and it was about 15 miles.

Q. I will get you to step down here and look at this diagram. Were you present when it was made?

A. Yes, sir.

Q. Did you assist in making it?

A. This house is a double log house.

27 Q. What is the distance from Sam Manus's to your house?

A. Two miles.

Q. What is the distance from Sam's to Anna Hitchcock's?

A. About the same.

Q. What is the distance over to the Thornton place?

A. One mile or about.

Q. Was there a fence all around the house?

A. Yes, sir.

Q. How far is it from Anna Hitchcock's to John Roahes'?

A. Half a mile.

Q. How far was it from the dead body to where the stable was?

A. Eighty steps.

(Here court took a recess until half past 1.)

AFTERNOON SESSION, 1:30 p. m.

Q. How old a man was Poorboy?

A. I could not tell you the exact age. He looked to be about 30.

Q. How old a man was Whitehead?

A. He looked to be about 25; I don't think he was any older. They looked to be about the same age, but Poorboy was a little the older.

Cross-examination:

Mr. FREDERICK (of counsel for defendant). Q. How old was Hampton—what was his name?

A. Wakula was the proper of it. That means whippoorwill, and they called him Wakoo for short.

Q. How old was he?

A. About 16, along there somewhere. I don't know his age; he looked to be about that age.

28 Q. How long have you known him?

A. I had been acquainted with him from just a child up to the time he was convicted and sent off, him and his father, three or four years ago, probably, and then I never saw him any more.

Q. He lived near you?

A. About five miles.

Q. His mother is Sam Manus's wife now, isn't she?

A. Yes, sir.

Q. Has Sam married her since his father was sent off to the pen?

A. Yes, sir.

Q. Sam has not been living there very long, has he?

A. No, sir; not a great while; I don't know how long; something over a year, I would reckon.

Q. She is a sister to Ned Christie, isn't she?

A. Yes, sir.

Q. Where does Ned live?

A. He lives in about ten miles of me; about 12 miles from where Sam Manus lives; I live closer to Ned tham Sam does.

Q. This boy Wakoo didn't live with Sam Manus until he came back from the reform school?

A. No, sir; he didn't have any permanent home at all; he was just traveling all the time, from what I could understand, and made that one of his stopping places, at Manus's with his mother.

Q. How long since he has been back from the reform school?

A. I don't know; he had been back for some time, but I don't know how long.

Q. Several months before this killing?

A. Oh, yes; considerable time before the killing.

Q. Had you seen him frequently?

A. No, sir; I hadn't seen him at all.

29 Q. Had you been up to Sam Manus's?

A. I could hear of him there; I never saw him there myself.

Q. You were not up to Sam's yourself?

A. No, sir. I have not been where Sam is living now since he has been living there.

Q. How long has he been living there?

A. Moved up there this winter; I don't know exactly the time. His wife was living there when he married her.

Q. Did Sam Manus live with her before he married her?

A. I don't know whether he did or not.

Q. How far is that from your house?

A. About five miles.

Q. How long has it been since Wakoo Hampton was sent off with his father?

A. A year or two, or two or three years, if not longer.

Q. You think that he wasn't over sixteen years old?

A. I don't think he was much older.

Q. How far did Mr. Hamilton live from you?

A. About the same distance—they lived close together—about five miles.

Q. Is the Hamilton that is marked in the map the one you are speaking of?

A. Yes, sir.

Q. He is a doctor?

A. Yes, sir; they call him a doctor.

Q. Did you know this boy John Brown before this thing happened?

A. No, sir; not at all; I had no acquaintance with him whatever.

Q. Had you ever seen him?

A. If I had ever seen him before he was arrested I don't know it.

Q. You never was out about Dr. Hamilton's, then?

A. No, sir; unless I was hunting stock or something of that kind.

Q. This woman Anna Hitchcock, I believe you say, is your daughter?

A. Yes, sir.

30 Q. He is a Cherokee Indian, is he?

A. Yes, sir.

Q. You are a Cherokee Indian, are you not?

A. Yes, sir.

Q. She lived about a quarter of a mile from you?

A. Yes, sir.

Q. Do you know this man Craig you speak of?

A. Yes, sir.
Q. What is his given name?
A. James Craig.
Q. What was the other one, his brother?
A. Mathew.
Q. Was he younger?
A. Yes, sir.
Q. Which one was it they had under arrest, Mathew or James?
A. James.
Q. James is the one they have got charged with adultery?
A. Yes, sir.
Q. How long had you known Roach?
A. I had known for 20 years him.
Q. Was he a Cherokee?
A. Yes, sir.
Q. You did not see any of these people when they came there that night?
A. No, sir; none at all.
Q. You had gone to bed and was asleep?
A. Yes, sir; I had been to bed. I did not see anybody come there that night but Poorboy, and he went to bed.
Q. Did he go to bed that night?
A. He went to bed a little after seven o'clock.
Q. That is after dark—this was in December?
A. Yes, sir; about half after seven, I guess, when he went to bed.
Q. How happened him to go to bed so early?
A. I had gone to bed when he came there, and there was nobody to set up with him. I had already gone to bed. I was worried; I had waited on my son.
Q. You do not know as a matter of fact whether Poorboy went to bed or not, do you?
A. I went in and led him to bed.
31 Q. Whitehead was in bed.
A. Yes, sir; he was in bed when Poorboy came; I gave him a light and went in the room with him.
Q. What time was it that Whitehead went to bed?
A. He went to bed before night; he had been complaining all that day. He had a chill. He got up and drank a cup of coffee, and went back to bed.
Q. You had not known very much about Whitehead?
A. Very little.
Q. He came to your house about the 4th?
A. Yes, sir; only had been there about four days.
Q. Did you ever see him before he came there?
A. No, sir.
Q. Was he a white man?
A. Yes, sir.
Q. Staid at your house four days?
A. Yes, sir; came there Friday and staid until Tuesday.
Q. What did he come for? What did he want to stay there for?

A. He came and claimed to be a detective officer, and he come to see if he could get any information in regard to Jim Craig. Jim Craig had been under arrest and got away; they had arrested him at my daughter's, Mrs. Hitchcock's, and they had heard of him coming over that way, and they fixed up an agreement to meet at my house that night to see if they could not find him.

Q. That must have been something subsequent; they did not have an agreement to come Tuesday when he came over Friday? I guess that was done afterwards, was it not? When he came to your house on Friday that was the first time you had ever seen him?

A. Yes, sir; he came with me from Tahlequah.

Q. He claimed to be a white man; did not claim to be a Cherokee, or a citizen there?

A. No, sir.

32 Q. Was he employed by the Cherokee authorities?

A. No, sir.

Q. Just a kind of a private detective?

A. Yes, sir; he was working, rather, under a man by the name of Wilkerson, I guess.

Q. Was he not working under this Cincinnati Detective Association. Did he not have a great big silver-looking star down here on his breast somewhere. Did he show you a star?

A. I didn't see it.

Q. Did not shot you a badge?

A. I didn't see any.

Q. Did he show you his pistol?

A. No, sir.

Q. He was around there working to get a ten-dollar reward?

A. Yes, sir; I think so.

Q. Was he paying board?

A. I understood there was a 20-dollar reward; I don't know as to that.

Q. Did he pay board at your house?

A. A 20-dollar reward by two different men, one by the marshal, Lamb, and the other by Mr. Hitchcock.

Q. That is your son-in-law?

A. Yes, sir; I just heard that; I don't know whether it is so or not.

Q. Hitchcock was around your house, was he not?

A. Yes, sir; he was then at the time waiting on my son, giving him some medicine, doctoring him, and so forth.

Q. Did this fellow pay board at your house?

A. Yes, sir; paid board by helping cut up wood, and sort of odd chores around the house. He wanted to stay there not longer than ten days, and I told him, "all I will charge you is to help my little boys get up wood and make fires, feed, and I won't charge you anything for your board."

Q. That is the way that he paid his board?

A. Yes, sir.

33 Q. Did he stay at your house, board at it all the time, from Friday until Tuesday?

A. He was rambling around at nights in the neighborhood; I don't know where he went to, looking around.

Q. He was around at Hitchcock's house; did he not go there?

A. I suppose that he went there; he said he did.

Q. Was he a married man?

A. I don't know.

Q. Did he claim to be?

A. He did not say anything about that whether he was or not.

Q. He thought it would take about 10 days to catch Craig down there, did he?

A. He came there to stay for that length of time.

Q. Would he take Hitchcock with him when he would go down there?

A. No, sir.

Q. He would go by himself?

A. Yes, sir; Hitchcock was staying with my son two miles from me.

Q. He never went down there to watch in the day time?

A. No, sir; never went down there any day time only on Sunday. He came on Friday, and all day Saturday they hauled wood, and Sunday they walked down there. That is, he walked down there.

Q. Did he go alone?

A. Yes, sir.

Q. Was Anna at home?

A. I don't know whether she was or not.

Q. Did he see Annie up at your house; was she up at your house at any time during the time he was there?

A. I expect she was; she was there very often.

Q. You had not discarded her, you had not forbid her to come to your house?

A. No, not at all.

Q. But she and her husband had disagreed?

34 A. Yes, sir; they had got into some kind of a ruffle some way or another, and he went off, but he had come back, you know.

Q. How long had her husband been away, Brown Hitchcock?

A. He went off last spring, and I forget whether it was in April or May.

Q. Went off and left her?

A. In April, I believe, went out to Vinita and staid there until my son was taken sick, and we wrote to him to come down and help take care of him.

Q. Is he a doctor?

A. No, sir; he is just a good nurse for a sick person.

The DISTRICT ATTORNEY. Who wrote for him to come down, you or your son?

A. My wife did; she wrote to him to come down. We were pretty well worried out.

Mr. FREDERICK (of counsel for defendant). Did Annie have any children?

A. Yes, sir; three children.

Q. Did they stay there with her?

A. Part of the time with her and part of the time with us. We lived close by, and their grandma was as near to them as her, and they were there pretty near all the time.

Q. Were any of these children at your house the night these men were killed?

A. I declare I can not answer that question correctly; but I do not believe they were—no, there were none of them there that night.

Q. Did you see Craig about there before that time?

A. Yes, sir; I saw him pass along frequently.

Q. That is, Jim Craig?

A. Yes, sir.

Q. He is the one charged with having committed adultery with Mrs. Hitchcock?

A. Yes, sir.

35 Q. He is a white man?

A. Yes, sir; they lived there in a mile and a half of me nearly three years, him and his father, and the whole family.

Q. You never saw him down there with Annie, did you?

A. Yes, sir; I have seen him there time and again.

Q. He was a married man, was he?

A. No, sir.

Q. Single man?

A. Yes, sir.

Q. I suppose that was after Brown Hitchcock had left you saw him down there, or before, which, at Annie's?

A. Well, before and after, both.

Q. Annie had a farm down there, did she not; ran a farm?

A. Yes, sir; got a pretty good farm.

Q. Was Craig working down there?

A. No, sir; I never saw him strike a lick of work.

Q. Not much on the work?

A. No, sir; if he was, I never seen him.

Q. I don't reckon Hitchcock was much on the work either, was he?

A. Pretty good.

The DISTRICT ATTORNEY. Mr. Hitchcock is a good man?

The WITNESS. Mr. Hitchcock is as honest a man as you will ever get acquainted with. I do not say it because he is Hitchcock, but he is just as straightforward a man as you will get acquainted with.

Mr. FREDERICK (of counsel for defendant). I am glad to know it. You went to bed before Poorboy came?

A. I went to bed just right after dusk.

Q. I suppose you fell asleep then?

A. Yes, sir; I was tired and worn out.

Q. You got up and showed him his room?

A. Yes, sir.

36 Q. Took a light and went into the room?

A. Yes, sir; had a lamp.

Q. He had not then put up his horse?

A. He went and put up his horse and came back in before I got the lamp.

Q. You told him where to put the horse?

A. Yes, sir; well, they had been there and he knew where to go; I said, "You go to work and put up your horse." I said, "You know where to put it."

Q. That was out at that barn, was it not?

A. Yes, sir.

Q. About 80 steps away?

A. Yes, sir; I stepped it so as to find out.

Q. Did you remain in the room until he came back after having gone to put up his horse?

A. I went back in my room when he went to put up his horse, and he came back and I took a lamp then and showed him his room.

Q. Did you see Whithead then?

A. Yes, sir; I asked him how he felt, and he said he believed he felt a little better. I felt of him and he was sweating then; fever had gone down.

Q. Did Poorboy bring anything along to make his spirits feel better?

A. No, sir.

Q. Did he have any liquor along?

A. No, sir.

Q. You had none?

A. No, sir; that is something I do not keep; I didn't have that in the contract.

Q. Did Poorboy go to bed?

A. He went to bed and I took the lamp out.

Q. After he got in bed?

A. Yes, sir; I asked him if he needed the lamp, and he said, "No; you can take it with you if you choose," and I took it in my room.

Q. Pulled off his clothing?

A. Yes, sir; pulled off his clothing and went to bed.

37 Q. The same bed with Whitehead?

A. Yes, sir.

Q. Did you leave them talking?

A. No, sir; they wasn't talking.

Q. Ceased talking when you left the room?

A. Yes, sir; I do not think Poorboy spoke to them at all. I just stepped up and felt of him and asked him how he felt, and he said he believed he felt a little better, and Poorboy stripped off and went to bed.

Q. Was there any windows in that room?

A. Yes, sir.

Q. Glass windows?

A. Yes, sir.

Q. Did you have shades or shutters?

A. Have blinds.

Q. Did you have curtains?

A. Yes, sir.

Q. Were the curtains all down?

A. Yes, sir.

Q. Blinds closed?

A. Yes, sir; all down.

Q. You could hardly see a light from the outside?

A. No, sir; you could not see anything, perfectly dark.

Q. In going out of that room would they go out into the hall without going through another room?

A. No, sir; you go right out of that room I was in into that room, and then out of the side-door entrance to the porch.

Q. In going out of the door that Poorboy and Whitehead were sleeping in, they would have to go through your room?

A. I have a door to go out there on the porch, but I can go right through that room, but there is a door out of my room into that room and then a door out of my room on to the porch.

Q. There is no door to the room they slept in except to go through your room?

A. Yes, sir; there is a little door that goes out into the hall; it has got three doors into it, the one they slept in.

Q. One entered into the room you slept in, one into the hall,
38 and where was the other?

A. Out into the side next to the porch.

Q. Was there any door fronting the gate, in the room in which they slept?

A. Yes, sir.

Q. Would that go to any floor?

A. Yes, sir; the porch floor. We have a porch from one end to the other.

Q. How far is that door from the gate?

A. The porch is just 9 feet wide, and then from the porch to the yard fence gate is just 10 steps.

Q. How far is it from the gate to where you found these men laying?

A. About 40 steps.

Q. More than 50 steps from the door then?

A. Yes, sir.

Q. That door is the nearest door of your building to the gate?

A. Yes, sir.

Q. Did you notice whether or not that door was left open, or any door left open?

A. The door was shut.

Q. Did these men have on their clothing?

A. Poorboy had on everything except his overcoat, and Whitehead had left all his clothing in there; he went out in his shirt sleeves and bare-headed; his hat, coat, and vest in the room.

Q. But Poorboy had on all his clothing?

A. Yes, sir; except his overcoat. He had his hat with him, too. It was lying right by him where he was.

Q. Whitehead's clothing were back in the room?

A. Yes, sir; hanging on a chair right at the head of the bed.

Q. You did not hear the shots fired at all?

A. Yes, sir; I believe that is what wakened me up, hearing them.

Q. Did you hear any more firing after you were awake?

39 A. A little bit after—or just at the close of the firing there was two shots a little distinct, sort like that way [indicating].

Q. That was after you got fully awake?

A. Yes, sir.

Q. But the firing of the shots first aroused you?

A. Yes, sir; just all in a flash like a big clap of thunder almost, and then there was two a little after.

Q. Did you hear any voices at all?

A. None at all.

Q. How long after you were aroused by the firing of these shots until you got up?

A. I reckon it must have been fifteen or 20 minutes.

Q. Quite a little while?

A. Yes, sir; I wasn't in a hurry to get up.

Q. Mrs. Shirly got up first?

A. Yes, sir; she was up when I woke up.

Q. She was at the window, was she not?

A. She had not gone to the window yet; she ran to the window about the time these last two shots were fired, and she said, "I believe there is somebody fighting." I asked her, "What in the world is that?" when that clap of shooting woke me up, and she sort of turned over in bed, and said that "It appears like somebody is fighting."

Q. Is your wife here?

A. No, sir; she got up then and went and stood by the window, and I asked her if she could see anything, and she said she could not see anything at all, and I said, "Do you hear anything;" and she said, "No."

Q. Did these men, Poorboy and Whitehead, have boots and shoes on?

A. Boots, both of them; they had on their boots. Both had on their boots, and their pants not pulled down over their boots.

Q. You left them in the room about 7:00 o'clock?

A. Yes, sir.

Q. And when you came back from having gone out the clock struck ten?

A. Yes, sir.

Q. Then it was a little less than three hours from the time you left them until you went out?

A. Yes, sir; it must have been.

Q. When you left Whitehead you say he was sweating, sweating after his fever?

A. Yes, sir; he appeared to be moist, and said he felt a little better.

Q. You had not got Whitehead to come there to help catch Craig, had you?

A. No, sir; other parties got him—Mr. Hitchcock and Mr. Lamb.

Q. You say that Poorboy had no home that you know of?

A. No, sir; not that I know of. He might have had, but if he did I don't know it.

Q. Was he a Cherokee officer?

A. No, sir; he was only a town guard under the sheriff at Tahlequah.

Q. As far as you know neither one of these men were officers?

A. No, sir; I am not certain about that at all.

Q. Whitehead said he was a detective of some sort; did you understand that was his business or just undertook a little job of his own?

A. I didn't understand; he did not tell me anything about that; I did not ask him. I did ask him when we were on the road to my house how long he had been working at this business and how he liked it, and he said he had been at it something near three years over this western part of the Territory, was about all he had to say about it.

Q. He did not tell you under what company he was working?

A. No, sir.

Q. He wasn't one of Pinkerton's, I reckon?

A. I asked him how he liked it, and he said he was getting tired
41 of it, and was on his way home then; was going to quit.

Q. Where was his home?

A. Up in Benton County somewhere, I think; I don't know whereabouts; I think it was in Benton County.

Q. He didn't like it much and was going to quit?

A. Yes, sir; was on his way home then; said he was beating on back towards Benton County.

Q. He was going in that direction, was he not?

A. Yes, sir.

Q. Had no horse, did he?

A. No, sir.

Q. Was walking?

A. Yes, sir.

Q. You did not see any pistol on his person?

A. I didn't see any pistol on him at all, only one that Poorboy had.

Q. You do not know whether he had one or not?

A. No, sir; although he staid at my house from Friday up to Tuesday, I did not see any pistol.

Q. Do you know what Poorboy came down to your house for?

A. I don't know what he came for; I know what he told me he came for. He come there to wait for these parties that had promised him to come from Tahlequah to look out for Jim Craig.

Q. To arrest Jim Craig?

A. Yes, sir.

Q. The Cherokee authorities?

A. Yes, sir; they had promised to meet him there at my house that night. He came on ahead of them with Hitchcock.

Q. That is these Cherokee authorities?

A. Yes, sir.

The DISTRICT ATTORNEY. You do not understand him.

Mr. FREDERICK (of counsel for defendant). Were the Cherokee authorities looking for Craig?

A. No; it was from the officers of this court.

The DISTRICT ATTORNEY. Craig is a white man, and is charged
42 in this court with adultery.

A. That is it.

Mr. FREDERICK (of counsel for defendant). He did not come there with any U. S. marshal?

A. No, sir.

Q. Whitehead did not claim to be an United States marshal?

A. No, sir.

Q. And as far as you know there was no persons there that had any authority from the United States?

A. Oh, I don't know anything about that.

Q. But you know that Poorboy was working under the sheriff of Tahlequah district, the sheriff of the nation?

A. Only what I heard; I don't know that positive, only what I heard; he claimed that himself. He claimed to be working for the sheriff at Tahelequah. He was under the control of the sheriff at Ta'lequah, but the sheriff had given Mr. Lamb the liberty to use him a couple of days.

Q. That is what you heard?
A. That is what I heard; I do not know it to be so.
Q. You do not know then whether or not Poorboy was working for the sheriff up there?
A. No, sir.
Q. The sheriff's name is Zeke Paris, is it not?
A. Yes, sir.
Q. How far is your house from Tahlequah?
A. It is called 15 miles.
Q. The 'ounds on this man were on what part of the body, front, back, or side?
A. All I saw were in front, you might say. Whitehead was shot right in the forehead here somewhere, and then one then looked to be right through his neck; I don't know whether it went through or not.
Q. On which side of the neck, left or right?
A. I don't recollect; it was might' near under; it might have been to one side.

43 Q. The other man had one in his upper lip?
A. That is all I saw, except some I saw in the clothing.

Redirect examination by the DISTRICT ATTORNEY:

Q. What is your wife's name?
A. Annie Shirly.
Q. She is at home, is she?
A. Yes, sir; I guess she is at home. She is confined there. She has got Mrs. Hitchcock's little children and my son's little children.
Q. Is there anybody you can leave there with the children, so she could come down there?
A. There is not a woman person in that neighborhood that I know of.
Q. You say that she was awake before you were?
A. Yes, sir.
Q. And she claims to have heard something there?
Answer. Yes, sir.

Recross-examination by Mr. FREDERICK:

Q. Is Ned Christie up there yet? Have you seen him lately?
A I have not seen him since he has been on the scout.

44 WILLIAM SULLIVAN, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Where do you live?
A. Tahelequah district, Cherokee Nation.
Q. How far do you live from Judge Shirley's?
A. I live about two miles south.
Q. Are you any relation to him?
A. No, sir.
Q. Do you know this defendant; did you know Wakoo Hampton in his lifetime?
A. Yes, sir.
Q. Do you know this defendant, Brown?
A. Yes, sir.

Q. I will ask you if you knew Josiah Poorboy in his lifetime?
A. I wasn't very well acquainted with him?
Q. Did you know Tho'as Whitehead?
A. No, sir; I did not.
Q. You did not know him at all, did you?
A. No, sir.
Q. You knew Poorboy some, did you?
A. Yes, sir; I had a slight acquaintance with him.
Q. Where were you on the day these two men were killed?
A. I was at home.
Q. Did you see anything of the defendant that day?
A. No, sir; I did not.
Q. Or of Wakoo?
A. No, sir.
Q. When did you first get any intimation of the killing?
A. Well, it was on March 9th, and the killing was done on the 8th.
Q. Did you go up to the place?
A. It was Wednesday morning, 9th day of December, that I went.
Q. Did you go up to where the bodies were?
A. Yes, sir.
45 Q. What did you find?
A. I found the body of two men in the road.
Q. Did you know who they were?
A. I didn't at the time; I didn't examine them.
Q. Did you afterwards?
A. Yes, sir; I found out it was Josiah Poorboy and Tom Whitehead.
Q. Did you see the wounds upon them?
A. I did in Tom Whitehead.
Q. Where was Tom wounded?
A. Right here [indicating].
Q. Did you notice any other wounds?
A. I didn't examine him at all; I didn't notice any. I didn't go down where the bodies were; I went on up to the house.
Q. You did not make any examination there, or at any other place?
A. No, sir.
Q. You only saw the wound in his forehead?
A. Yes, sir.
Q. That was Whitehead?
A. Yes, sir.
Q. How about the other one?
A. I did not notice any wounds upon him at all; I did not stop. He was lying in the road, on his right side.
Q. You did not examine?
A. No, sir; his hand kind of hid his face.
Q. Did you go up to Annie Hitchcock's place?
A. Yes, sir.
Q. Please state if you stopped there.
A. I didn't go to the house. On riding past the house Mrs. Hitchcock came out, and I thought she called me. My stepson was along with me, George Townsend; he is about 18 years old. And I stopped my horse, and she spoke to George and told him that she wanted him.

Mr. FREDERICK. You need not tell what she told you.

The DISTRICT ATTORNEY. You passed her house?

A. Yes, sir.

46 Q. Did you go in the house?

A. No, sir.

Q. Why didn't you go in?

Mr. GRACE (of counsel for defendant). We object to that. It does not make any difference.

The DISTRICT ATTORNEY. I propose to show a conspiracy between this woman and these men. I propose to show, as I have stated to the jury, that she is primarily responsible for this thing. I propose to show, at least by circumstances, that these men went by her direction and by her procurement for the purpose of committing murder upon that evening. I will show that they were there at her house. I will show that they assembled there armed, very heavily armed. I will show that they left her house together. I will show on the way they said they were going to kill her husband, with whom she had quarrelled. I will show that they were going to meet Craig, her paramour, at her request. I will show that immediately after the killing they brought their wounded companion back to her house and left him there, and in half an hour afterwards Craig came to her house. And I will show many other things, sir, pointing to a conspiracy between her and these men. And I think if I can show that upon the morning after the killing that one of her neighbors passed by her house and that she forbid him to come in the house where this wounded man was lying, that is a circumstance more or less strong, as the future testimony may develop. Of course I have to commence some place. I have to commence at the beginning. I can not unfold the thing all at once. I can not have one witness to state to the court and jury all the facts and circumstances, because no one witness knows them.

Mr. GRACE (of counsel for defendant). It may be so that he
47 can show some of those things, but this that he proposes to show now is not one of them. He asks this man a question that can not be relevant under any shape of case; that is, why he did not go in. It does not make any difference in the world why he did not go in.

The DISTRICT ATTORNEY. It makes a difference if she forbid him to come in.

Mr. GRACE (of counsel for defendant). That is not the question.

The DISTRICT ATTORNEY. He started to tell it and you stopped him.

Mr. GRACE (of counsel for defendant). His reason for not going in may have been one thing or another, as far as we can see. That is what we object to. I do not know what the district attorney proposes to prove by it or what his motive or object is, but I think the evidence is wholly irrelevant, besides Mrs. Hitchcock, who my friend talks so much about, figures in this case in no other capacity than that of a Government witness. The district attorney seems to have something against her. I do not know what it is. I suppose it is something that he has found out since.

The COURT. I do not think that the reason this witness had for not going in are competent, but what the woman said I think you might ask. Of course if this is not connected with other conduct of the defendant it could not possibly affect him one way or the other.

Mr. GRACE (of counsel for defendant). What the woman said could not bind this man.

The COURT. Her conduct and actions might indicate conspiracy.

48 Mr. GRACE. Nothing that a coconspirator can say on the day after the killing can bind the party.

The COURT. That is true; but you can show her conduct after the conspiracy is over, and her declarations, for the purpose of showing conspiracy.

Mr. GRACE (of counsel for defendant). That is the very thing you can not show. If she had said, in so many words, "Me and Brown had conspired to kill that man," that would not be testimony.

The COURT. It would not be testimony standing alone. It has to be connected with other circumstances.

Mr. GRACE. The statements of a coconspirator next day after the crime has been committed does not bind the party on trial.

The COURT. You can not make any declarations made during the commission of the crime binding unless you prove conspiracy first, but you may commence at any end of it for the purpose of proving it.

Mr. GRACE (of counsel for defendant). If it is during the commission it is a part of the res gestae.

The COURT. I will hear what the testimony is, and then we will see.

Mr. GRACE (of counsel for defendant.) Of course, there is a great deal of this evidence in. We want to get on the proper basis at the start. We want strenuously to object to any matters coming from a coconspirator after the killing was done.

The COURT. It is not offered for that purpose at all, for the purpose of binding the defendant now, but it is offered for the purpose of tending to prove conspiracy.

Mr. GRACE (of counsel for the defendant). And that means to bind the defendant.

49 The COURT. If a man kills another, and a third party hides the body, the fact of hiding the body may be offered to show that the party was in the conspiracy. The fact of hiding the body does not bind the one who does the killing unless a conspiracy is established, but that conduct may be used in the establishment of the conspiracy. You have to establish the conspiracy before the acts are binding.

Mr. GRACE (of counsel for defendant). Neither of which, unless both are proved, are of any force.

The COURT. That is true; but you may show the conduct of the party for the purpose of establishing that conspiracy.

Mr. GRACE (of counsel for defendant). We save the point.

The DISTRICT ATTORNEY. Please state, when you passed by her house, whether or not she forbid you to enter.

The COURT. That was the day after the killing?

The DISTRICT ATTORNEY. Yes; the morning after the killing.

The WITNESS. She told me not to come in the house. She was speaking to my stepson; she wanted to see him.

Q. Did you go in?

A. I did not.

Q. You were horseback, were you?

A. Yes, sir.

Q. You made no particular examination of the bodies?
A. No, sir.
Q. What was done with them afterwards?
A. They were taken to Tahlequah.
Q. Do you know who took them?
A. Mr. Shirley's wagon took them. I think I can give you the names of the men: George Myers, Brown Hitchcock, and my stepson, George Townsend; I can not call to mind exactly the names of the
50 men that went along. I went down to town to make arrangements for them to receive the bodies there, and on the way back I met the bodies going to town.
Q. What is your stepson's name?
A. George Townsend. There were some five or six men in the crowd with the bodies.
Q. Did you see the defendant and Wakoo Hampton after that?
Yes, sir; I saw them several times.
Q. Where did you see them?
A. Generally passing in the road; I saw them once or twice, once I think, at Mrs. Hitchcock's—Mrs. Annie Hitchcock's.
Q. How long was that afterwards?
A. I could not exactly say how long it was afterwards, but several times afterwards.
Q. Several times afterwards you saw these two men at Annie Hitchcock's?
A. Yes, sir.
Q. How often had you seen them there after the killing?
A. I should not say over twice after that; I did not go up that way very much.
Q. Were they armed?
A. They were.
Q. Do you know what arms they carried with them after this killing?
A. They generally had a gun apiece, and a pistol or so apiece; I could not say exactly what it was.
Q. Did they go together?
A. They generally went together.
Q. Horseback or on foot?
A. Sometimes on foot, and sometimes horseback. Generally both riding one pony.
Q. One behind the other?
A. Yes, sir.
Q. They had a Winchester apiece, you say?
A. Yes, sir.
Q. Generally a Winchester and a pistol or two apiece?
A. I would not say exactly about the pistol.
Q. Did you ever see them at work any after that?
51 A. I never did.
Q. Do you know where they would stay of your own knowledge?
A. I think the time was about divided between Anna Hitchcock's, and Sam Manus's; was pretty well divided between these two places, I think.

Q. Do you know Jim Craig?
A. Yes, sir; I know him.
Q. Please state if you saw him along about that time.
A. Yes, sir; I saw him frequently.
Q. Where?
A. Down to Mrs. Hitchcock's.
Q. Was that after or before the killing?
A. I saw him there before and after too.
Q. How soon after the killing did you first see Craig there at her house?
A. It was several days; I would not state exactly.
Q. Please state if you ever saw Craig and Hampton and defendant together after the killing.
A. No, sir; I never did.
Q. Were you and Anna Hitchcock at the time of this killing bad friends or not?
A. We were not the very best of friends.
Q. Where was Mr. Hitchcock living at that time, if you know—Brown Hitchcock?
A. After the killing he went to Vinita.
Q. Where was he living at the time of the killing, do you know?
A. He was in our neighborhood. I saw him the day that the bodies were taken to Tahlequah; I never saw Brown for a great while after that; I do not believe I saw him any more until I met him on the train here at Ft. Smith, coming down to this place. He told me he had been at Vinita.

Cross-examination by Mr. GEO. A. GRACE:

52 Q. You say you were not acquainted with Brown before this killing, or did you say you were acquainted with him?
A. I was a little acquainted with him; I was not very well acquainted with him.
Q. You were not much acquainted with him?
A. I saw him a few times before the killing taken place.
Q. Do you know where he was at work, staying, at the time of the killing?
A. I think he was stopping at Sam Manus's.
Q. You heard, then, of the killing on the next day; that is, on the morning of the 9th, and you went up to Mr. Shirley's, did you, on the morning of the 9th; what time did you get there?
A. Well, it was, I think, a little after sunup; a very little after sunup.
Q. Was anybody there when you got there?
A. There was Mr. Barker; is all the men, I think, there was there, besides Mr. Shirley; there was two or three little boys had a fire built up not a great ways from the bodies, and were watching the hogs off the dead bodies of the two men that were laying in the road; I suppose that was their business; that is what they told me they were doing.
Q. Did you measure the distance from the fence or gate?
A. I did not.
Q. How long did you stay there?
A. I did not stay there but a few minutes at Mr. Shirly's.
Q. You went on?

A. Yes, sir.
Q. Was your nephew, George Townsend, with you then?
A. No, sir; he stopped there, and I went on to town by myself.
Q. Had he come from your home with you?
A. Yes, sir.
Q. Where did he get with you at—George Townsend?
A. He went with me from my house.
Q. Did he go in at Mrs. Hitchcock's?
53 A. He left me at Mr. Shirly's, or I left him there; he did not go on with me any further.
Q. I thought he went down to Mrs. Hitchcock's?
A. He stopped there as we went on by, a few minutes, and I waited until he came out, and we went up to Shirley's together.
Q. He went in the house, did he?
A. Yes, sir.
Q. Did she tell him not to come in?
A. If she did he never said anything to me about it.
Q. She told you not to come in?
A. Yes, sir. She was speaking to George; she wanted George to come in; rather, wanted to see him.
Q. How far were you from where they were talking?
A. I was 20 or 25 steps.
Q. Did you hear what they said?
A. She told me that she wanted George to come in, and I didn't hear any of the conversation between her and Townsend at all.
Q. Just give her language; what she said to you.
A. She came out on the porch and spoke to him. I thought she spoke to me. I and him was riding right side and side in the road, and I stopped the horse and asked her what she wanted, and she said, "I don't want you; I want George." She was well acquainted with him. That is the way she spoke; she said, "I want George."
Q. And then you went on, did you?
A. No; I stopped there until George came on. I held his horse until he went in and came out, and we went up to Mr. Shirly's together.
Q. He dismounted, did he; got down off of his horse?
A. Yes, sir; he got down off of his horse and went in the house.
Q. That was all she said, was it?
A. Yes, sir; that is all she said to me.
54 Q. Then she did not say to you, "Don't you come in here," or anything of that sort?
A. She said she would rather I would not, or something to that effect.
Q. She said she wanted to see George?
A. I asked her what did she want, or something like that, and she said, "I want George."
Q. Then George went?
A. Yes, sir.
Q. That was the conversation, was it?
A. That was about the substance of it.
Q. Why don't you give all of it, if that is not it?
A. That is about it.
Q. How long did George remain?

A. He did not stay in there very long, probably three, or four, or five minutes; something like that.

Q. Then he came and got back on his horse, I suppose?

A. Yes, sir.

Q. And you rode on?

A. Yes, sir.

Q. That was all there was of that?

A. Yes, sir.

Q. Now, you say you never saw Jim Craig with the defendant here and Wakoo after that shooting. Did you ever see them together before?

A. Yes, sir.

Q. When was that?

A. I saw them together, I thonk, on Saturday before the men was killed; on Tuesday, I think it was.

Q. Where was that at?

A. They passed my house.

Q. Where do you live?

A. I live two miles southwest of Shirly's, or about south.

Q. Was Craig a white man or an Indian?

A. Well, he was claimed to be a white man; his father tried to prove his rights in the Cherokee country, but he failed; I could not say what he was.

Q. Are you a white man?

A. I claim to be a white man.

55 Q. Were you about Mrs. Hitchcock's a great deal?

A. Not very much.

Q. Did you live up near about San Manus's or not?

A. We call it three miles; three and a half from our house to Sam's.

Q. Were you around about Sam's very much after the killing?

A. Not very much.

Q. When you say, the', that the defendant and Wakoo Hampton divided their time between Mrs. Hitchcock's and Sam's I suppose you just state from information you received from others?

A. That was what my knowledge was from what I could gather.

Q. It was your want of knowledge, because you never were about Mrs. Hitchcock's much nor about Sam's much?

A. Not any great sight. Every time that I would pass one or the other places they would generally be at one or the other places, but I wasn't there no great sight, but from floating rumors in the country that is where they stopped.

Q. That is just a supposition of your own?

A. Yes, sir; that is what it was.

Q. Did you ever see them at Mr. Manus's at all?

A. Yes, sir; I saw them there once or twice, and saw them at Mrs. Hitchcock's one time or twice.

Q. Together?

A. Yes, sir.

Q. Was that after the killing or before the killing?

A. After the killing.

Q. You and Annie were not on very good terms?

A. No, sir; we were not at that time on the best of terms.

Q. Have you got friendly yet together?

A. We pass friendly.

Q. Did you ever see Whitehead down to Mrs. Hitchcock's?

56 A. No, sir.

Q. Did you ever see Mr. Poorboy down there?

A. No, sir; I never did.

Q. Had you been around to Mr. Shirly's the day before this killing?

A. I hadn't.

Q. Where were you on the 8th?

A. I think I was at home.

Q. On the 7th had you been up in the direction of Mrs. Hitchcock's?

A. I don't think I had.

Q. On the 6th had you been up that way?

A. I don't think I had.

Q. On the 5th?

A. Well, I don't think that I had; if I had I don't remember anything about it. I do not think I had been up in that country for several days before that.

Q. On any of these days had you seen the defendant Brown on the 5th, 6th, or 7th?

A. I think maybe he and Hampton passed my house the Saturday before; I think it was. I think it was Saturday evening, maybe; it was the first time I had seen them for several days—two or three days, anyhow. They passed my house.

Q. Both on one pony?

A. They were not that day.

Q. How were they riding?

A. They were riding a horse apiece.

Q. Are you certain it was them?

A. I know it was them.

Q. Were you close to them?

A. I was. I was not very far from them.

Q. Did you talk to them?

A. I do not remember speaking any words to them. There was three or four men there at my house—Sam Manus and George Myers and Bill Blevins and myself and George Townsend; my stepson was at the woodpile, and these two men came riding along from the south, I don't know where they were going, and they stopped probably five or ten min-

57 utes there, stopped and talked with the boys, but I do not think I passed any words with them at all.

Q. That was the last time you saw them before the killing?

A. Yes, sir.

Q. They were going towards Sam Manus's?

A. Yes, sir; that road it forks right after it passes my house, and one road goes to Sam's and the other to Mrs. Hitchcock's; I don't know which place they went to.

Q. You saw nothing more of them?

A. No, sir; I never saw anything more of them until after the killing.

Q. What did they do with the bodies of the dead men?

A. Took them to Tahlequah.

Q. Did you go to Tahlequah?

A. Yes, sir.

58 THOMAS CAYWOOD, having been duly sworn upon behalf of the Government, was examined by the district attorney, Wm. H. H. Clayton, and testified as follows, to wit:

Q. Where do you live?

A. I live ten miles from Siloam Springs.

Q. How far do you live from Judge Shirley's?

A. It is about 20 miles.

Q. Do you know Anna Hitchcock?

A. Yes, sir.

Q. Do you know this defendant, Brown?

A. Yes, sir; I have seen him there times; that is, before I came here.

Q. Did you know Wacoo Hampton?

A. No, sir; I only just knew him as I heard of him. I never did see him until the night of this murder.

Q. Where did you see him that night?

A. At Anna Hitchcock's.

Q. What were you doing there at Anna Hitchcock's?

A. I had worked sometime before this time for her, and I went down there to get what she was owing me. She was owing me between 7 and $8.00, and I had started to Tehlequah and thought I would go by there and get it, and staid all night at her place.

Q. What time did you get there?

A. I got there on Monday evening, about an hour by sun, I guess.

Q. Was that the evening of the killing?

A. No, sir; the killing was on Tuesday evening, and Monday evening I got to Anna Hitchcock's.

Q. Did you stay there all day Tuesday?

A. Yes, sir.

Q. And Tuesday night?

A. Yes, sir.

Q. Do you know a man named John Roach?

A. Yes, sir.

59 Q. Please state if he was at Anna Hitchcock's house on the evening of Tuesday of the killing.

A. I saw him there just about dusk.

Q. Do you know his wife?

A. Yes, sir.

Q. Had you seen his wife before that at that place?

A. Yes, sir; his wife had been there at that place before he was.

Q. What time of day did John Roach come?

A. He come about dusk; it was getting dusk when he come there.

Q. How did he come; horseback or on foot?

A. He come horseback.

Q. Please state if he was armed.

A. He had his double-barreled shotgun with him.

Q. His wife had been there during the day sometime?

A. Yes, sir.

Q. Please state if you saw this defendant and Hampton there; and if so, when did they come?

A. They came the same time Mr. Roach did; that is, I reckon they did; I was out, and when I came in they were all three sitting around the fire together.

Q. Please state if they were armed.

A. Yes, sir; John Brown there had a Winchester, I think, and Waco Hampton had one or two pistols; I never noticed; I seen one anyway.

Q. Had you seen Craig there that day?

A. No, sir; I hadn't seen Craig.

Q. You knew him, didn't you?

A. Yes, sir; I knew him.

Q. How did the defendant and Hampton come; whether on horseback or on foot?

A. I don't know; there was one pony there; they had a pony there between them.

Q. How long did these men stay at her house?

60 A. Well, I reckon they must have staid there three-quarters of an hour.

Q. Did they get supper there?

A. No, sir.

Q. Was supper over?

A. Yes, sir.

Q. What were they doing there, these men, this three-quarters of an hour?

A. Just sitting around the fire talking, laughing, and drinking some.

Q. They had some whiskey with them, did they?

A. Yes, sir.

Q. How much whiskey did they have, and who had it?

A. They had a quart that I seen.

Q. Who had it?

A. I don't know which one of the boys did have the whiskey; it was setting on the fireplace there; they had set it on the fireboard when they came in. When I came in they passed around the bottle. Wacoo said to John Brown, "Pass it around."

Q. And then you took a swigger, I suppose?

A. Yes, sir; I took a dram.

Q. What was Annie Hitchcock doing?

A. She was setting around there talking.

Q. Did you see her and Hampton have a talk together?

A. No, sir; I didn't notice her.

Q. You did not notice any private talk?

A. No, sir.

Q. Was Mr. Brown Hitchcock there?

A. No, sir.

Q. Brown Hitchcock was her husband, was he not?

A. Yes, sir.

Q. They set there three-quarters of an hour; then what did they do?

A. They all left there, and started up the creek, my understanding was.

Q. All three of them?

A. Yes, sir.

Q. What was your understanding?

61 A. That they were going up the creek; that is all I understood about it.

Q. What do you mean by up the creek? Going up the road that runs up that way?

A. Yes, sir; there is a big road that went up the creek.
Q. That road went by Judge Shirley's, did it not?
A. Yes, sir. They were going up the creek is all I know about that.
Q. Up the creek and up the road?
A. Yes, sir; I don't know where they were going.
Q. That is not the road that leads over to Manus's house, is it?
A. No, sir.
Q. The big road goes right up the creek by old man Shirley's house?
A. Yes, sir.
Q. A valley between the two mountains?
A. Yes, sir.
Q. There is a creek runs up that way?
A. Yes, sir.
Q. And the road runs up that way?
A. Yes, sir; the road keeps up between the mountains.
Q. How do you mean by going up the creek?
A. That is all I know. I just heard some of them remark they were going up the creek.
Q. There is only one road going up the creek there, isn't there?
A. Yes, sir; only one main road.
Q. Did they go up that road when they left?
A. I don't know. I just seen them start off from the house; that is the last I seen of them.
Q. Which way did they start?
A. That is the way they started; up that way.
Q. How were they riding?
A. I could not tell; they had two horses between them; I think there was two riding one horse.
Q. Do you know which two?
A. No, sir.
62 Q. They came there about dusk, and they left in three-quarters of an hour; it must have been dark when they left there, then?
A. Yes, sir; it was dark when they left there.
Q. Please state if you saw them any more that night.
A. Yes, sir; it was an hour, or maybe over an hour; they all three came back to Anna Hitchcock's.
Q. Roach, Brown, and Hampton?
A. Yes, sir.
Q. Please state if you heard any shooting while they were gone?
A. Yes, sir; I heard some shooting.
Q. Where?
A. I heard two rounds of it. The first round I could not tell which way it was fired, and then for about a second it ceased, and it commenced again. It was at old man Shirley's.
Q. You heard that?
A. Yes, sir.
Q. How long after you heard that shooting until these men came back?
A. About ten minutes, I reckon.
Q. Please state if either of the three were wounded.
A. Yes, sir; John Roach was wounded.

Q. Where?
A. Wounded in the arm, sort of up towards the shoulder.
Q. Please state if they brought back the same arms they left with or any others?
A. Well, I reckon they had some arms there; Wacoo Hampton had a Winchester that he said he took from Heck Bruner. I supposed that one of the men that he killed was Heck Bruner, and the other Whitehead. I think that he had another pistol, too.
Q. Heck Bruner was a deputy marshal, was he not?
A. Yes, sir.
Q. Who had the extra pistol?
A. Hampton.
Q. Who did they say they took the pistol from?
63 A. I didn't hear him say who he took the pistol from.
Q. When they came back there had you gone to bed?
A. No, sir.
Q. Who let them in?
A. I let them in the house. I opened the door and then they came in.
Q. What time in the night was that?
A. Well, it was 8:00 o'clock by Anna Hitchcock's clock.
Q. Please state if you saw Craig that night.
A. Yes, sir.
Q. Where?
A. There at Anna Hitchcock's.
Q. Jim Craig?
A. Yes, sir.
Q. When did he come?
A. Just as the moon went down; it just went down when he come.
Q. Was that before or after these fellows were killed?
A. After these fellows were killed.
Q. Just as the moon went down or just after?
A. Just after the moon went down.
The DISTRICT ATTORNEY. The almanac, if your honor please, shows that upon the 8th of December last the moon set at just 12:00 o'clock in the longitude of New Orleans, Pittsburg, and Boston, all three at the same time.
Q. Were these men there when Jim Craig came?
A. No, sir.
Q. Who wasn't there?
A. Brown and Wacoo Hampton.
Q. There were three of them?
A. John Roach was there.
Q. He remained there, did he?
A. Yes, sir.
Q. The defendant and Wacoo left?
A. Yes, sir.
Q. When did they leave?
A. They didn't stay more than half an hour.
Q. When they came in, how long had they been gone before Craig came?

64 A. I don't know, sir; by that clock of Anna's they came in at 8:00 o'clock, and I noticed that Craig came there just after the moon went down.

Q. Do you know whether there had been any tampering with the clock or not?

A. I used to stay there a good while before that and the clock was never right when I staid there, and she said she didn't reckon it was yet.

Q. Did you see her at the clock that evening?

A. No, sir; I never noticed her at the clock.

Q. How long did Craig stay there?

A. I reckon he must have staid there some two or three hours, anyhow.

Q. Did he leave before daylight, before daybreak?

A. He left before; yes, sir.

Q. Where did he start to go to?

A. I don't know where he did go to; he just went out of the house the last I saw of him.

Q. What was he doing there during the three hours he staid there?

A. He was talking to this woman, asking about Roach.

Q. Talking to who?

A. Anna Hitchcocke.

Q. Was he armed?

A. Yes, sir.

Q. What arms did he have?

A. He had a pistol.

Q. Anything else?

A. No, sir.

Q. Don't you know that he had a gun?

A. I didn't notice any gun; no, sir.

Q. A. Winchester?

A. No, sir; I didn't notice any.

Q. Did he have but one pistol?

A. Yes, sir.

Q. Didn't he have any other arms?

A. Not that I saw.

Q. How did he carry his pistol?

A. He just had it stuck down in his pants here.

Q. You had not seen him that day previous to that?

A. No, sir.

65 Q. When he left there he left without letting you know where he was going?

A. No, sir; he never said anything to me about it.

Q. He was talking a while to Anna?

A. Yes, sir.

Q. There was another girl there by the name of Blevins?

A. Yes, sir.

Q. You were talking to her, wasn't you?

A. No, sir; there was another fellow there talking to her, I reckon.

Q. Who was that?

A. Richard Wolf.

Q. That left you with the bag to hold?

A. Yes, sir; I didn't have nary girl.

Q. Where was Craig talking to Anna; would they go off by themselves or how about that?

A. Yes, sir; sometimes they would be by themselves, sometimes in the house there.

Q. Where would they go when they were by themselves?

A. Just go off in the room there.

Q. Go off in the room by themselves?

A. Sometimes they would.

Q. How often did they go?

A. I never noticed more than once or twice.

Q. I should think once would be enough in three hours (laughter). You saw them go off in the room by themselves, did you?

A. Yes, sir.

Q. You knew that Craig was on the scout at that time, did you not?

A. Yes, sir.

Q. Did you see him while he was under arrest?

A. No, sir; I hadn't seen Craig since the morning that Charley Lamb came to get him first arrested him until I seen him here at Fort Smith.

Q. Where did Charley arrest him?

A. At Anna Hitchcock's; that was while I was working there for her.

66 Q. When was that; how long before this time?

A. It must have been three weeks, I reckon, anyhow.

Q. Charley Lamb was a deputy marshal, was he not?

A. Yes, sir.

Q. What was Jim Craig doing at Hitchcock's?

A. I don't know what he was doing; he staid around there a great deal.

Q. Was he there a good deal before this?

A. Yes, sir; he had been there a good deal.

Q. Did he stay there at night?

A. Yes, sir.

Q. Where did he sleep?

A. I don't know: sometimes I reckon that he slept with her.

Q. He was staying there living with her, was he or was he not?

A. Yes, sir; he staid there a great deal.

Q. Was he doing any work there?

A. No, sir.

Q. Staid there night and day both without working?

A. Yes, sir.

Q. How old a man was he?

A. Jim Craig is about 21 or 22.

Q. A young fellow?

A. Yes, sir.

Q. Are you a married man?

A. No, sir, not now; I have been.

Q. Were you at that time?

A. No, sir.

Q. Did you and Craig sleep together while you were staying there?

A. I have slept with Craig.

Q. Did you sleep together?

A. Once in a while I did.

Q. You know where he slept, I reckon; where was it?

A. Sometimes he slept with this woman.

Mr. GRACE (of counsel for the defendant). I do not know whether that tends to prove conspiracy or not; if it does, of course, we do not object ot it.

The DISTRICT ATTORNEY. Was there anything said about Craig that night before these men left?

A. Not that I heard.

Q. Now, Cayward?

A. No, sir; I never heard anything said.

67 Q. Did you know where Craig was at that time?

A. No; I had n't been there since the morning they took Craig off, about 20 miles north of that.

Q. I will ask you if you did not hear Anna tell Roach that she wanted him to go with these boys, or words to that effect, to Craig?

A. No, sir; I never heard her tell Roach any such stuff as that?

Q. Were you right there with them all that time?

A. Yes, sir; from the time I went in the house until they left.

Q. You do not know how long they had been there when you went in?

A. No, sir; I don't know when they come*l*; they were setting there when I went in the house.

Q. Where had you been?

A. I was out doing up the chores, and likely I brought in a load of stove wood when I came in, and they were all setting around the fire, Roach, and Brown, and Hampton.

Q. Where was Annie?

A. She was setting around the fire too, and Florence Blevins was there too.

Q. All five of them were sitting around the fire?

A. Yes, sir.

Q. What had transpired before you went in you do not know?

A. No, sir.

Q. Did you know that she had sent over for Roach by his wife when she was there?

A. I had heard some such talk as that.

Q. There that day?

A. Yes, sir.

Q. What did she want with him?

A. I thought she had sent for him because she wanted to kill hogs the next day.

Q. Did she kill hogs the next day?

A. No, sir.

Q. Did she tell you that was what she sent for him for?

A. Yes, sir.

Q. He came over there that night with a double-barreled shot

68 gun, did he?

A. Yes, sir.

Q. They only lived about half a mile apart, didn't they?

A. Something over half a mile apart. You see, she was owing me some, and she said she had a couple of hogs she would kill and take to

town to get my pay, if I would stay there until she killed them, and I heard some of them say she was going to get Roach to help her kill the hogs.

Q. Do you know why Roach was not taken to his home that night instead of being brought to Anna Hitchcock's?

A. No, sir.

Q. Did you hear any reason given for it?

A. No, sir.

Q. It was only half a mile over there to get to his house, was it not?

A. Yes, sir; I reckon it wasn't much over half a mile.

Q. Did his wife come over there that night?

A. Yes, sir.

Q. How long after he was brought there?

A. I reckon it must have been something over half an hour.

Q. Do you know who conveyed to her the information that her husband was at Anna's?

A. No, sir; I do not know.

Q. How long did you remain there after this killing?

A. I staid there until they come and took John Roach away.

Q. How long was that?

A. I forget the day of the month.

Q. How many days afterwards?

A. I think they come and got him on Saturday.

Q. The next Saturday?

A. Yes, sir.

Q. You staid there during that time?

A. Yes, sir.

Q. What were you doing?

A. I was waiting on John Roach.

Q. Did you see anything of Craig during that time?

A. Not since this night.

Q. Did you see anything of Hampton and the defendant?

69 A. No, sir.

Q. Didn't they come there after that?

A. Not during that week; no, sir; they never came there while I staid there.

Q. Did you see anything more of them after the killing?

A. No, sir; I never did see them.

Q. I suppose you, Anna and the rest of you, went up to see these men the next morning?

A. No, sir; I went after the doctor for Roach.

Q. Did Mrs. Blevins or Anna go up there?

A. I don't know whether they went up or not.

Q. Now, then, you may state what these men said there when they came to the house. Just state it exactly as they said it.

A. When they came in, John Brown there was leading John Roach, come to the door, and I got up and let them in, and John Roach told me he was shot, and for me to take his gun, and I took his gun, and I asked him if it was empty and he said no. He says, "We got into an awful fight up the road, and," he said, "I didn't have a thing to do with it at all." He said he never fired a gun; he told me to examine the gun and

see, and I just run the ramrod down each barrel and it was loaded, and they both remarked, Brown and Hampton, that Roach didn't have anything to do with it. Wacoo said that was all he hated about it; that Roach was with them in it and he was innocent. Wacoo said they had killed two marshals, and they come in, and I didn't believe them much, and I asked John Brown if it was so they did kill anybody, and John Brown said "We laid out two marshals for a certainty;" and I said "Is that so?" and he said "That's no lie." And they asked us to take care of John
70 Roach there, and they said they would have to leave him there and I staid there with him.

Q. Did they tell you who the marshals were?

A. Yes, sir; said it was Heck Bruner and Whitehead.

Q. Heck Bruner was a marshal at that time?

A. Yes, sir; Hampton gave me a gun that he said he took from Heck Bruner, and also a pistol.

Q. Did they say whether they got anything from the other man or not?

A. Never said anything about getting anything from Whitehead, any arms. So then they stood around about an hour, and Wacoo said four or five times that he killed the fellows, and that if anybody wanted to know tell them that he killed them, and he was ready to kill more.

Q. Did he first say that they had killed the marshals or Brown?

A. Wacoo was telling it, and I asked John Brown, and he said it was true enough; that they left or laid out two marshals up there, and that that was no lie.

Q. And gave the names of the marshals?

A. Yes, sir; he said he thought it was Heck Bruner and Whitehead.

Q. Did they show you a belt?

A. No, sir; I never saw the belt.

Q. But they displayed to you the gun and pistol?

A. Yes sir.

Q. Both of them said that Roach had nothing to do with it; that the only thing that they were sorry for, he was along, and was innocent?

A. Yes, sir.

Mr. FREDERICK (of counsel for defendant). Wacoo said that?

The DISTRICT ATTORNEY. He said both of them said that. (To the witness.) I believe you said that, didn't you?

A. Yes, sir; that is what they both said.

Q. That is when Roach was telling you that his gun was empty;
71 that he did not have anything to do with it, didn't fire a gun, and they spoke up and said that was true, and he didn't have anything to do with it, and the only thing they were sorry about was that he was into it and he was innocent?

A. Yes, sir; Roach said himself that he never fired a gun.

Q. Please state if they showed you any pistol that had any belt on it.

A. Yes, sir.

Q. Which pistol was that, one they had taken or one of their own?

A. One they had taken, and the Winchester had lots of blood on the stock of it. They said they pulled the Winchester out from under Bruner.

Q. Did they say what part of the body they shot them?

A. No, sir.

Q. Now, then, what became of Roach's horse?

A. These boys, I think, rode the horse off.
Q. Did they take the two horses with them?
A. Yes, sir; I heard one of them tell him that he would send the horse back.
Q. Do you know where they started to go to when they left Anna Hitchcock's?
A. No, sir.
Q. They didn't say?
A. No. sir.
Q. What reason did they give for leaving?
A. They said it would not do to stay there; Wacoo told Brown it would not do for them to stay there.
Q. And they left?
A. Yes, sir.
Q. That is the last you saw of them?
A. Yes, sir; until I saw Brown here. I never saw Wacoo any more at all.

Cross examination:

Mr. FREDERICK. You say you are living there at Anna's, mak-
72 ing your home there?
A. No, sir; my home is about 20 miles north of there.
Q. You had been living there?
A. Yes, sir; I staid there some time ago, along in the summer.
Q. You made a crop there?
A. Yes, sir; and worked one month for her; commenced in October and quit in November, and never was back until this time.
Q. She was owing you how much?
A. 87.25.
Q. You went up to get your money?
A. Yes, sir.
Q. You got there when?
A. Monday evening.
Q. You staid there until Saturday?
A. Yes, sir; I staid there until they come and got John Roach.
Q. You were acquainted with Wacoo Hampton before, were you not?
A. No, sir; never had seen him before that any.
Q. You hadn't seen John Brown had you?
A. I seen him three times before that I remember.
Q. Where?
A. I saw him once at a dance, and I saw him twice at Anna Hitchcock's—once that I remember of.
Q. While you were staying there?
A. Yes, sir.
Q. He stopped there, did he?
A. Yes, sir; stopped there awhile.
Q. By himself?
A. No, sir; his brother was with him—no, that is, one of these Hamilton boys was with him, Frank Hamilton was along with him and I think his brother; they just staid there a little bit at the wood pile, I remember, and they went on in the house.

Q. How long were they gone that night after they left? You say that the' left there, you don't know how long they were gone, but they came back with Roach wounded.

A. They were gone three-quarters of an hour, or close to it, until
73 I heard this shooting; maybe it was an hour they were gone, and in about 10 minutes after the shooting they came in.

Q. Let's count that ten minutes. You think they were gone as much as an hour?

A. Yes, sir.

Q. They got there about dark when they first came?

A. Yes, sir; it was getting dark when they were there.

Q. How long about did they remain there?

A. They staid there about three-quarters of an hour.

Q. They were gone about an hour?

A. Yes, sir.

Q. That would make an hour and three-quarters and ten minutes. When they came back it was 8 o'clock you say.

A. Yes, sir; by Anna Hitchcock's clock it was.

Q. How did you happen to notice the clock?

A. It was setting there and I noticed it.

Q. Was it exactly 8:00 o'clock?

A. Yes, sir; it was 8:00 o'clock.

Q. Just exactly 8:00, or a little before or a little after?

A. It was just 8:00 o'clock.

Q. You remember it was just 8:00 o'clock?

A. Yes, sir.

Q. Did you make any remark about it?

A. No, sir; I believe Anna did; said it was 8 o'clock.

Q. About 10 minutes before this you had heard this shooting?

A. Yes, sir.

Q. Was the door closed whey they came there?

A. Yes, sir.

Q. I am speaking of the last time, when Roach came wounded.

A. Yes, sir.

Q. Did they hollo, make any noise?

A. No, not until they got to the door.

74 Q. You opened the door?

A. Yes, sir.

Q. Did they call to you to open the door?

A. Yes, sir; one of them said, "Open the door."

Q. You were well acquainted with Roach?

A. Yes, sir; tolerable well acquainted.

Q. Some acquainted with Brown?

A. I saw him three times.

Q. But not acquainted at all with Hampton?

A. No, sir.

Q. But you learned who he was, I suppose?

A. Yes, sir; I had heard about him lots of times.

Q. Did Roach walk into the house?

A. Yes, sir; he walked in.

Q. Did he come in first?

A. Him and John Brown came in together. John Brown was leading him, right at his side.

Q. Where was Hampton?

A. He was coming in, too, but he had stopped, I think, about the gate, maybe, to tie his horse, I don't know, but he was a little behind the other two.

Q. He brought in two guns with him, did he?

A. I don't remember; I never noticed him when he came in; I think, though, that he brought in one Winchester with him, and Brown had one, too.

Q. Brown and Hampton had Winchesters?

A. Yes, sir.

Q. Did Roach have any gun?

A. He had a double-barreled shot gun.

Q. He was carrying a gun, and wounded?

A. Yes, sir; I think he was carrying it.

Q. All three had guns, then?

A. Yes, sir.

Q. How many pistols did Hampton have?

A. He had two that I noticed.

Q. Did anybody else have any?

A. I never noticed them.

Q. Who told you about how the fight occurred?

A. Roach.

75 Q. What did Roach say about it?

A. Roach said they were going down the road and these two fellows what they killed, supposed one to be Bruner, and the other was Whitehead, he said they came out and halted them.

Q. Go on and tell how he told it.

A. And he said that they asked him if his name was Mathew Craig, and he told them no, and they told him to get down anyhow, and he said they got down, and he told him to lay the gun down, and he was laying the gun down, and as he was laying it down somebody shot him and he thought it was Whitehead, and he said from that they fired loose, these other two fellows, Brown and Hampton; he said they just fired loose and shot him.

Q. After he was shot?

A. Yes, sir.

Q. How many shots were fired, did he say, by Whitehead and this other fellow, before they fired any shots?

A. He never said. He simply said they told him to lay down his gun; he got off, and somebody shot him, and he thought it was Whitehead shot him.

Q. From that they all commenced firing?

A. Yes, sir.

Q. Roach is the one that told you about the fight, how it occurred?

A. Yes, sir.

Q. Hampton didn't tell it?

A. Well, yes; Hampton was telling it in the house; he was trying to tell it, too. Roach is the one that told me individually how it was. He said that was the way it was.

Q. Was he telling it in the presence of these other fellows?
A. Yes, sir.
Q. Hampton told it about the same way, did he?
A. No, sir; Hampton said he shot Roach himself, shot him accidentally.

Q. Did he correct Roach while Roach was telling it, that he
76 shot him instead of Whitehead?
A. I don't know that he did or not.

Q. When was it that he said that he shot Roach, while Roach was telling you or afterwards?
A. They were all in the house together when Roach was telling it.
Q. Roach first told it, did he?
A. Yes, sir.
Q. He told it so they could hear it, did he not?
A. Yes, sir.
Q. Was it while Roach was telling how he got shot that Hampton said that he was the one that shot Roach, or did he wait until Roach got through and then turn in and tell how it was?
A. They were all drinking right smartly and I think they were all trying to tell it at one time.
Q. Did you hear John Brown say anything about it?
A. I never heard John Brown say anything about it occur'ed, any more than I didn't know whether they were telling the truth or not, and I asked Brown if they killed anybody up the road, and he said, "Yes, we laid out two marshals to a certainty," and I said, "Sure enough?" and he said, "That is no lie."
Q. Were they drunk?
A. No, sir; they were not so drunk but that they could go, but they were pretty full.
Q. How was Brown, pretty full himself?
A. Yes, sir; I thought he was.
Q. Didn't you think that he was pretty full before he left there that night?
A. No, sir.
Q. He was passing the bottle around?
A. He was drinking right smartly when he left there.
Q. He passed the bottle around and you took a swig?

A. I took one dram out of the bottle.
77 Q. Is that all you took?
A. Yes, sir; that is all I remember.

Q. It was a fresh bottle, wasn't it?
A. Yes, sir; the bottle was full.
Q. You got about the first drink out of it?
A. Yes, sir; I think I did.
Q. It went around, did it not?
A. I think they passed it around.
Q. Didn't offer to pass it again before they left?
A. I don't know whether they did or not.
Q. You don't remember whether they drank any more?
A. No, sir.
Q. They took it with them?

A. Yes, sir.
Q. Did they bring any of it back?
A. None that I seen.
Q. Did you see the bottle?
A. No, sir; I don't remember of seeing the bottle.
Q. When you first saw them they seemed to have been drinking right smart, didn't they?
A. Yes, sir.
Q. Did the women take any drink out of the bottle; did you see them drink any?
A. I never noticed them after that.
Q. At any time?
A. They were drinking some; the women were.
Q. What was the other woman's name?
A. Florence Blevins.
Q. Did she live there with Annie?
A. Yes, sir; was staying with her.
Q. She was a married woman, too?
A. No, sir.
Q. She was a widow, was she?
A. Yes, sir.
Q. Was there any other men living there except you?
A. There was some there that night.
78 Q. They didn't live there; didn't make it their home?
A. No, sir.
Q. You were the only man that made his home there?
A. No, sir.
Q. What other man made his home there?
A. Jim Craig staid there right smart until they come and arrested him. I think this old fellow, called Dave Rinks, after I left there, come and staid there.
Q. He took your place after you left?
A. Yes, sir; come and staid, off and on.
Q. Did they keep a sort of an inn, or something of the kind?
A. No, sir; he just done chores for them like I done.
Q. You usually stopped there some three, four, or five days when you passed by, did you?
A. No, sir; that was the first time I had been down there since I quit working for her?
Q. I believe you are a single man?
A. Yes, sir.
Q. Which one of them were you sparking?
A. I wasn't sparking nary one of them.
Q. You were not stuck on either one of them?
A. No, sir.
Q. You never heard Anna having any conversation with the defendant or Wacoo before they left there?
A. No, sir; I never noticed anything of the kind.
Q. All you understood was that they were going up the creek?
A. Yes, sir.
Q. Didn't say what for?

A. No, sir.

Q. You say that Roach said that they rode down the road and these men halted them——

The DISTRICT ATTORNEY. Came out and halted them.

79 The WITNESS. Yes, sir.

Mr. FREDERICK (of counsel for defendant). And asked them if Mathew Craig was there?

A. Yes, sir; asked John Roach if he wasn't Mathew Craig, and he said no.

Q. Did he say he told them who he was?

A. He never told me whether he did or not. He just said he told them he wasn't Mathew Craig, and they told him to get down and consider himself under arrest, and he said he got down, and he said when he got down he laid his gun down, and he said as he was raising up somebody shot him, and he said that he thought it was Whitehead that done it.

Q. Did they say anything about these two other men, Wacoo and John Brown?

A. No, sir; they never said nothing about them.

Q. Did he say whether they were armed or not, when they told him to lay down his arms; did they have any arms, Poorboy and Whitehead?

A. Yes, sir; they did.

Q. What did they say they would do with them?

A. They never said, but they took the pistol and Winchester away from them.

Q. Did he tell you that they told him to get down and lay down his gun, or did he tell you they had any pistol or gun and would do anything with them?

A. No, sir; never said; just walked out and halted him, and told him to lay down his gun.

Q. He told you that Whitehead shot him?

A. Yes, sir; he said he thought he did.

Q. What with?

A. He didn't say.

Q. You never asked?

A. No, sir.

Q. But they showed a pistol and gun they claimed to have got from them?

A. Yes, sir.

Q. Did they claim to have got them both from the same man or one from one and one from the other?

80 A. They never said; they said they taken the Winchester from Heck Bruner he fell on it, and I never asked them which one they got the pistol from, and they never told me anything about it.

Q. You say that Hampton said that he done the shooting, and that Roach had nothing to do with it, and all he hated about it was that he was sorry that Roach was along?

A. He just said that all he hated about the killing was that John Roach was with them, and he was innocent; had nothing to do with it.

Q. Did he say that he had shot them?

A. Yes, sir.

Q. Didn't he say, "I killed them fellows myself, and I am ready to kill any more of them"?

A. Yes, sir; he said that four our five times—that he killed the fellows himself, and if we seen anybody that wanted to know who killed them to tell them that Wacoo Hampton killed them, and he was ready to kill more of them.

Q. Didn't claim that John Brown done it?

A. That Wacoo Hampton did it.

Q. Did Brown or Roach, or either one, say anything when Wacoo said that he was the one that killed these fellows?

A. No, sir; they never told me anything about it.

Q. They did not deny what Wacoo said, and say that they did any of the killing?

Q. John Brown said just what I said before. I asked him if they sure enough did kill anybody up the road, and he said, "Yes; we laid out two marshals to a certainty," and I said, "Is that so?" and he said "It is no lie."

Q. Wacoo Hampton said, "I killed them fellows, and if anybody wanted to know who did it to tell them that he did it"?

A. Yes, sir.

81 Q. That he was ready to kill more?

A. Yes, sir.

Q. Neither Roach nor Brown denied what he said when he said it?

A. No, sir.

Q. Didn't Wacoo show you how he shot his pistols? Did he not claim that he shot them in both hands? Didn't he claim that he shot them with two pistols?

A. If he did say that I never heard it.

Q. Did he tell you how he could manage to kill two men so rapidly; how he could be able to kill more than one?

A. No, sir; he never told me anything more about it.

Q. Did he tell it in your presence?

A. If he told it I didn't hear it.

Q. All that John Brown said was in answer to the question you asked him; you thought maybe it wasn't so, that it was a cock and bull story, and that is the reason you turned to John and asked him?

A. Yes, sir.

Q. And John said, "Yes, that is so." Did he say "we"?

A. Yes, sir; he said, "We laid out two marshals, for a certainty;" and "that is no lie."

Q. That is all he said about it?

A. Yes, sir; all he said about it to amount to anything.

Q. Wacoo was the man who did the talking, him and Roach?

A. Yes, sir; that is about all I heard Wacoo say about it. He said five or six times that he killed them, and he was ready to kill more.

Q. He not only killed these men, but he was the man that had shot Roach?

A. Yes, sir; he said he done it accidentally.

Q. Did he claim that these men shot at him?

82 A. Yes, sir; he said they were shooting at him.

Q. That is what Wacoo said?

A. I think he said so.

The DISTRICT ATTORNEY. Be certain about that.

Mr. FREDERICK (of counsel for defendant). What makes you think about that; did he say it or not?

A. I won't be certain that Wacoo said they were shooting at him, but that is my knowledge that Wacoo said they did?

Q. Roach said they were shooting at him; you are sure about that?

A. Yes, sir; because Roach said he thought Whitehead was the one that shot him.

Q. Your best recollection now is that Hampton said they were shooting at him, too, is it?

A. Yes, sir; to the best of my recollection and knowledge I heard Hampton say they were shooting at him.

Q. You staid there until Saturday, and you never saw Hampton any more, and never saw the defendant until you saw him under arrest?

A. No, sir; I never saw Hampton or BROWN, either one.

Q. And they came Saturday and arrested Roach?

A. Yes, sir.

Q. I suppose you left there then?

A. Yes, sir; I left there.

Q. Did the woman kill the hogs and you get your pay?

A. No, sir; she didn't while I was there.

Q. Didn't do any hog-killing?

A. No, sir.

Q. You had a sick man on hands?

A. Yes, sir; she never killed any hogs while I was there.

Q. She has paid you before this time, has she not?

A. No, sir; she still owes it yet.

82½ Re-direct examination by the DISTRICT ATTORNEY:

Question. You say that Hampton said when Roach said he though' Whitehead shot him that he (Hampton) done it accidentally?

A. Yes, sir.

Q. Did he say who he was shooting at when he shot him?

A. No, sir; he never said.

Q. Didn't you hear some of them say that Hampton was shooting at Whitehead when he shot Roach?

Mr. GRACE (of counsel for defendant). We object to that manner of asking questions.

The WITNESS. He was shooting at one of the boys, I don't remember which one, though, and that is how come him to shoot Roach when he was shooting at them.

Q. Did he say anything to you about the part of the body they shot these men in?

A. No, sir; they never said anything to me about it.

Q. When they were telling this what was Annie Hitchcock doing?

A. She was there around the fireplace, and I think she was taking care of Roach, maybe.

Q. Looking after Roach's wounds?

A. Yes, sir; me and her both; we taken his coat and shirt off and fixed to dress him. We thought there would have to be something done.

Q. You think that Hampton said that they were firing?

A. Yes, sir; Hampton said the way he come to shoot John Roach he said he shot him accidentally; he said he shot at the other boys.

Q. That he was shooting at some other one?

83 A. Yes, sir; one of these two that he killed, Bruner or Whitehead; he claimed one of them was Bruner.

Q. Was any of them shot except Roach?

A. No one, only them two that was killed.

Q. I mean either of this party?

A. No, sir; if they were they never said anything about it. They likely would have said something if they had been shot.

Q. Were their horses shot?

A. There was one horse shot in the stable.

Q. Were either one of the horses shot that was with them?

A. No, sir.

Q. Neither one of the parties shot but Roach, and he was shot by Wacoo Hampton, according to his own declaration?

A. Yes, sir; that is right.

84 FRANK HAMILTON, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. Where do you live?

Answer. I live in the Cherokee Nation.

Q. How far do you live from Judge Shirley's?

A. I live about six miles.

Q. In what direction?

A. I live south of old man Shirley's.

Q. Southeast, is it not?

A. Sort of southeast.

Q. How far do you live from John Roach's house?

A. About five miles, I guess.

Q. That would make you five miles and a half from Annie Hitchcock's?

A. Yes, sir.

Q. How do you go from your house to Roach's? Do you go up a road or a trail?

A. I go a trail, but I can go a wagon road.

Q. Do you know this defendant, John Brown?

A. Yes, sir.

Q. Did you know Wacoo Hampton in his lifetime?

A. Yes, sir.

Q. Did you know Jim Craig?

A. Yes, sir.

Q. Do you remember the time of the killing of Poorboy and Whitehead?

A. Yes, sir.

Q. Please state if upon the night they were killed you saw Wacoo Hampton and the defendant and Craig, that night or the next morning?

A. The next morning I seen them.

Q. Where?

A. At home?

Q. At your father's.

A. Yes, sir.

Q. What is your father's name?

A. Hugh Hamilton.

Q. Where were they when you first saw them?

85 A. They come do'n to the house that morning——

Q. Where from?

A. From the stables.

Q. Altogether?

A. No, sir.

Q. Who came first from the stable?

A. Wacoo Hampton and John Brown.

Q. How long before?

A. I don't know how long; it was before breakfast.

Q. Did all of them come before breakfast?

A. No, sir; John and Wacoo came a little before breakfast, and Jim Craig came about breakfast time.

Q. Where did they stay that night, or any portion of it?

A. I reckon they staid up in the stable loft.

Q. Your father's stable?

A. Yes, sir.

Q. What time did they come there and go to the stable loft?

A. I could not tell you, for I was in bed asleep that night.

Q. You do not know what time they come?

A. No, sir; I don't know what time they come there.

Q. Did Craig sleep with them in the loft?

A. No, sir; he came there that morning after sunup a while.

Q. Craig didn't sleep in the loft with them, then?

A. No, sir.

Q. How old are you?

A. I am growing on 18.

Q. Where were the horses?

A. They were in the stable.

Q. How many?

A. One.

Q. What horse was that?

A. That was John Roach's horse.

Q. Had they any arms?

A. Yes, sir.

Q. What arms did they have?

A. They had a Winchester apiece, and Wacoo had two pistols, and John had one.

Q. How was Craig armed, if armed at all?

86 A. He just had one pistol on.

Q. Do you know whether Wacoo Hampton was on the scout or not from the marshals—had been before that?

A. Yes, sir; I think he was scouting from the marshals.

Q. Each one of them had a Winchester gun when they came to your house that morning?

A. Yes, sir.

Q. Wacoo had two pistols?

A. Yes, sir.

Q. How did he carry them?

A. In his belt.

Q. And the defendant had one pistol; how did he carry his?
A. Carried it in his belt?
Q. Both of them had belts?
A. Yes, sir.
Q. Did they have any extra belt with them?
A. I think they had one extra belt.
Q. Do you know whose belt that was?
A. No, sir.
Q. Did they tell you?
A. No, sir; never told me anything about the belt.
Q. Had you heard of the killing until they came there?
A. No, sir.
Q. Did they tell you about it?
A. Yes, sir.
Q. What did they tell you about it?
A. They told me that had killed two marshals down there close to old man Shirley's.
Q. Who told you that?
A. John and Wacoo.
Q. Go on and tell all about what they said, how they killed them, and all about it.
A. They said they went up the creek there to see Jim Craig, and they could not find him up the creek, and that they come on back there by old man Shirley's, and them men came out there, and they halted them and asked them if they were not Jim Craig and Mathew, and they told
87 them they were not, and they told them they guessed they would capture them, and told them to get down off of their horses, and they said they just got down and went to shooting.
Q. Did they say where they came out and halted them?
A. At old man Shirley's house.
Q. Who was it they said came out and halted them?
A. Whitehead and Poorboy.
Q. Did they know their names at that time? Did they not call one of them Heck Bruner?
Mr. GRACE (of counsel for the defendant.) Do not suggest the name.
The DISTRICT ATTORNEY. Did he say anything about Heck Bruner?
A. No, sir; I don't think he said anything about Heck Bruner.
Q. He told you it was Poorboy?
A. He said one was Whitehead; they knew him.
Q. Who did they say the other was?
A. They didn't say.
Q. You have said they said Poorboy; did they say his name, or did you just say it?
A. I said his name because I heard his name afterwards.
Q. I want you to tell just what they said to you there, not what you heard afterwards. They said they had killed two marshals?
A. Yes, sir.
Q. Did they tell you their names?
A. They said Whitehead was one of them, and didn't know the other one.

The COURT. Which one of them was it that told you how it occured, the shooting?

A. Both of them told me.

The COURT. This defendant and Wacoo Hampton?

A. Yes, sir.

88 The DISTRICT ATTORNEY. Go ahead, and state what they said after that.

A. I don't believe they said anything else.

Q. Did Brown make any statement to you as to which one he killed?

A. I think he said he killed Whitehead.

Q. Did Hampton say who he killed?

A. He said he killed Poorboy.

Mr. GRACE (of counsel for defendant). That is leading.

The DISTRICT ATTORNEY. Go on?

A. He said that he killed Poorboy. Hampton did.

Q. John Brown was the one that told you that he killed Whitehead?

A. Yes, sir; he did.

Q. Did he say how he killed him?

A. No, sir; he never told me how he killed him.

Q. Did he say where he shot him?

A. No, sir; never told me where shot him.

Q. But he told you he killed him?

A. Yes, sir.

Q. You knew Brown pretty well, didn't you?

A. Yes, sir.

Q. Were you and he friends?

A. Yes, sir.

Q. How long had you known him?

A. I had known him nearly two years, or about 2 years I believe.

Q. Please state if Craig was present when this talk was going on.

A. Yes, sir; he heard this talk.

Q. Did they tell you why they wanted to see Craig?

A. I think Wacoo wanted to get with him to scout with him.

Mr. GRACE (of counsel for defendant). You ought not to tell what you think about it.

The DISTRICT ATTORNEY. Did they tell you why?

A. He said they wanted to get with him to scout with him.

Q. What horse was Craig riding?

A. He was riding a light bay horse.

89 Q. Whose horse was it?

A. Annie Hitchcock's horse.

Q. Do you know the name of the horse?

A. No, sir; I don't reckon I know the name of the horse.

Q. While they were talking there about this thing, did Craig say anything about it?

A. No, sir; I don't think he mentioned anything about it; if he did I don't remember it now.

Q. Did he say anything about as to where he was when the shooting occurred?

A. He said he was somewheres up about old man Shirley's, about the foot of the hill; I could not tell you whereabouts he was.

Q. When was it he said he was at the foot of the hill above old man Shirley's?

A. When the firing was going on.

Q. Was it before these men talked about it or after that he said that?

A. It was after this talk.

Q. They were present, were they?

A. Yes, sir.

Q. Did he say what he was doing there, and what he did afterwards, Craig?

A. He said he had a little fire built up there in the road, and was warming by it.

Q. Go on and state all he said.

A. He said he was just standing there warming by the fire and he heard the shooting, and he said he thought it was on towards old man Carter's, and he said he 'lowed some of the marshals had run on Ned Christie over there.

Q. Did he say where he went after that?

A. He said he went on over to John Roach's.

Q. Did you have this talk with them before or after breakfast?

A. It was after breakfast.

Q. Did Craig and all of them eat breakfast at your house?

A. John and Wacoo eat breakfast at our house, and Jim Craig
90 ate breakfast at my brother's house.

Q. What is your brother's name?

A. Monroe Hamilton.

Q. Did you know at the time they were eating breakfast in your house that they had killed these men that night?

A. Part of the talk was at breakfast and part of it after breakfast.

Q. You did know while they were eating breakfast that they had done the killing?

A. Yes, sir.

Q. Did they say anything to you about the guns of the deceased?

A. They said they got a gun and a pistol from them.

Q. Did they show it to you?

A. Yes, sir; I seen the gun and the pistol.

Q. Who did they say they got it from, which one?

A. He said he got the gun from Poorboy and the pistol from Whitehead.

Q. You say "Poorboy." I want to have you use their language.

A. They did not say Poorboy. They did not tell me who it was.

Q. They got the gun, then, from the one they didn't know?

A. Yes, sir.

Q. And the pistol from Whitehead?

A. Yes, sir.

Q. You say you saw them both; who had the gun?

A. Wacoo had the gun and pistol both.

Q. What gun was it that the defendant had, if you know? You say they both had Winchesters.

A. He had the Winchester that Wacoo had. Wacoo had a Winchester before he got into that killing, and John had that one.

Q. How long did they remain at your house after breakfast?

A. I could not say.

Q. They came there in the night; when you saw them how long did they stay there after you got up in the morning?

A. I could not tell you just exactly how long; some time in the day they left there.

91 Q. What were they doing while they were there; where were they staying?

A. Staying about the house there.

Q. This is about 6 miles, now, from the place of the killing, you think?

A. Yes, sir.

Q. There is a mountain running down there, is there not, between your place and Judge Shirley's?

A. There is a mountain between John Roach's and Shirley's.

Q. Do you live on a public road, or where?

A. Yes, sir; I live on the public road.

Q. What road do you live on?

A. I live on the road that comes from Cincinnati going to Tahlequah.

Q. That road runs away up by Sam Manuses, the way I have got it on this map?

A. There is one road that comes from Cincinnati down that way too; down Barren Fork.

Q. Do you live on that road coming down Barren Fork?

A. No.

Q. Do you live on the road that goes down by Sam Manus's?

A. No, sir; not the one that goes down by Barren Fork to Sam Manus's.

Q. Sam Manus lives northwest of Judge Shirley, does he not?

A. Yes, sir; I believe he does.

Q. You live southeast, don't you?

A. Yes, sir.

Q. That is opposite directions. Please examine this map. [Witness does as requested.] What direction does the road run that you live on?

A. It runs west.

Q. West from your house?

A. Yes, sir.

Q. Does it run toward Tahlequah?

A. Yes, sir.

Cross-examination by Mr. GEO. A. GRACE:

Q. How far is it from your house to old man Hamilton's, the doctor's, your father's?

A. I live at his house myself.

92 Q. How far is it from your brother's house?

A. Something about 100 yards.

Q. Which house did these parties go to first when they came there that morning, Monroe's or the old man's?

A. I think they went to Monroe's house first.

Q. After they went up there then they came down to your house?

A. Yes, sir; I think they did.

Q. When you heard them talking who was present but yourself?

A. Well, I don't believe there was anybody but me and Wacoo, Jim Craig and John.

Q. Where was Doctor Hamilton, your father?

A. He was down at the house.

Q. Where was your mother?

A. There at the house.

Q. Where were your sisters?

A. At the house.

Q. Were you not at the house?

A. No, sir.

Q. Where were you?

A. We were out towards the stables.

Q. Was that when they first came or the next morning? Was that during the night or in the morning?

A. In the morning.

Q. You didn't see them at night at all, did you?

A. No, sir; I didn't see them that night when they came home.

Q. It was the next morning, after daylight?

A. It was about daylight, before breakfast.

Q. It was after you had got up and fixed to eat breakfast, was it not?

A. Yes, sir.

Q. They had slept there somewhere during a part of the night, hadn't they?

A. I think they had slept in the stable loft.

Q. I am not asking you what you think. Can you think where a man sleeps and be right certain of it?

A. Yes, sir; I can be certain of it when I know it.

93 Q. Did they?

A. They said they slept up there in the stable loft.

Q. All of them?

A. John and Wacoo did.

Q. But Craig didn't sleep there; he came there in the morning?

A. Yes, sir; he came there that morning.

Q. Did you hear them talk with anybody else except yourself about this matter?

A. Not that I remember of.

Q. You are sure now you can remember it and tell it just as they said it?

A. I can.

Q. You know you have not left out anything. You do not know what road you live on at home, do you?

A. Yes, sir; I know what road I live on at home.

Q. Do you think you could find your way home if you were turned loose from here now?

A. Yes, sir; I am certain I could find my way home.

Q. You say these fellows both told you all about that; that is, they both commenced talking to you at once. What was the use of both of them telling you? Didn't you catch on to it from one telling you?

The DISTRICT ATTORNEY. You need not answer that question; it is very natural for both of them to tell it.

Mr. GRACE (of counsel for defendant). Go on and answer it. Did they both tell you at the same time?

A. I don't know that they both spoke at the same time.

Q. Which told you first?

A. I believe that Wacoo told me first.

Q. Then the other one told you over again; thought you did not understand it?

A. I don't know that he did, but he told me it.

94 Q. He told you all the same?

A. Yes, sir.

Q. And then Wacoo told it over again to you, did he not? I will ask you if Wacoo didn't tell you what he shot with himself; what kind of a weapon he shot with?

A. He shot with a 38 pistol.

Q. He shot with a pistol, did he?

A. Yes, sir.

Q. Did he tell you whether he shot one or two?

A. He shot two.

Q. Did he tell you he shot with both hands?

A. He never said anything about shooting with two hands.

Q. But said he shot with two pistols?

A. Yes, sir; he said he shot one pistol until he emptied it, and then shot the other.

Q. Did he tell you who shot the marshals?

A. He said he shot one and John the other.

Q. What were they shooting so many pistols for at one man; did he explain that?

A. I don't know anything about that.

Q. Did they tell you?

A. I told you what they said.

Q. What did John shoot with, did he say?

A. John shot with a Winchester.

Q. That is what Wacoo said?

A. Yes, sir.

Q. What did Roach shoot?

A. I don't know what Roach shoot—he said Roach never shot any.

Q. Did he say anything about Roach?

A. He said Roach was along.

Q. That is all they said about Roach, was it; that he was along?

A. They said he got shot when he was along.

Q. Did Wacoo say anything about whether he was going to, or would shoot more of them if they came along? How long did they stay there at your house?

A. They staid until up in the day sometime; I could not tell what time it was.

Q. Do you know which way they went or where they went to?

95 A. No, sir; I don't remember now which way they went.

Q. You saw them when they left, didn't you; did you see them?

A. Not as I know of.

Q. Did you ever see them any more?

A. Yes, sir.

Q. How far is it from your house to Sam Manus's?
A. It is about 7 miles.
Q. Do you know that this boy was working up at Sam Manus's?
A. Yes, sir.
Q. Don't you know that he went on home from there to Sam Manus's?
A. I don't know that.
Q. You do not know whether he did or not?
A. No, sir.
Q. Did you go to Shirley's where these men were?
A. No, sir; I never went to Shirley's.
Q. You don't know anything at all about this matter except what you heard the boys say?
A. Yes, sir; that is all, what I told you.
Q. Your memory is very good, is it not? You know exactly what a man tells you a year or two ago. Do you ever forget anything?
A. Sometimes I do. My memory is not the best in the world.
Q. And you can give the conversation word for word. Could you tell to-morrow what you have heard to-day?
A. I reckon I could, if I——
Q. How old are you?
A. I am growing on 18.
Q. Were you acquainted with Whitehead?
A. No, sir; I had seen him once.
Q. When?
A. Awhile before the killing.
Q. Did you know he was down there at Shirley's?
A. Yes, sir; I knew he was there.
Q. When had you seen him there?
96 A. I seen him awhile before he was killed.
Q. A good while?
A. No; not a good while.
Q. Well, how long a while?
A. I could not tell you exactly.
Q. As much as six weeks?
A. No, sir; it wasn't that much.
Q. Was it as much as four weeks?
A. About 2 weeks, I reckon, or maybe not that long.
Q. Were you acquainted with Poorboy?
A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Question. Where had you seen Whitehead?
A. At Annie Hitchcock's.

Recross-examination by Mr. C. J. FREDERICK:

Question. I expect that is the place you saw him, at Annie Hitchcock's instead of Shirley's, is it not?
A. I never said I saw him at Shirley's.
Q. You saw him at Annie Hitchcock's?
A. Yes, sir.
Q. How often did you see him at Hitchcock's?
A. One time?

Q. At nighttime?
A. Yes, sir; it was nighttime.
Q. What were you doing there at night?
A. I was just there.
Q. Was there any girls there?
A. There was one or two.
Q. You are not a married man, are you?
A. No, sir.
Q. You went there sparking, did you?
A. No, sir.
Q. You didn't go there to see the widow?
A. No, sir.
Q. You didn't go there to see Whitehead?
A. No, sir; I wasn't acquainted with him.
Q. Was there anybody else there but you and Whitehead, any men?
A. Yes, sir.
Q. There was another man there?
A. Yes, sir.

97 The DISTRICT ATTORNEY. That was Jim Craig?
Mr. FREDERICK (of counsel for defendant). Who was that?
A. John and Waco.
The DISTRICT ATTORNEY. When was that?
A. That was awhile before the killing; I could not tell you—about two weeks, I guess.
Q. You did not know they were going to be there, did you?
A. I went there with John and Waco; I didn't know Whitehead was going to be there.
Q. You didn't expect to find any men there?
A. I didn't know he was going to be there.
Q. You were not hunting men, were you?
A. I just went to be going.
Q. You were looking for women, were you not?
A. I don't know that I was looking for women at all.
The DISTRICT ATTORNEY. It is no harm if you were.
Mr. FREDERICK (of counsel for defendant). How many women were there there?
A. Three, I believe.
Q. Who were they? Annie was there, of course?
A. Yes, sir; and Florence Blevins and Laura Herring.
Q. She was your girl, was she not?
A. No, sir.
Q. She is now?
A. No, sir.
Q. You split up, did you?
A. We have never been split in. [Laughter.]
Q. How long did you stay there that night?
A. We left sometime that night.
Q. Did you leave before Whitehead left?
A. No; he left before we did.
Q. How long did Whitehead stay?
A. I don't know how long he staid; I went to sleep.

Q. Did John go to sleep too?

A. Yes, sir; I slept with John.

98 Q. Where did Whitehead sleep?

A. I went to bed and left him setting up by the fire.

Q. You left Whitehead and who else?

A. John Shirley.

Q. Where was Wacoo?

A. He was gone to bed.

Q. He went to bed too?

A. Yes, sir.

Q. Had the woman gone to bed when you, John, and Wacoo went to bed?

A. Yes, sir.

Q. The others had outset you?

A. I wasn't setting nothing.

Q. The women had gone to bed and left Shirley and Whitehead setting up by the fire basting their shins by the fire?

The DISTRICT ATTORNEY. He said he wasn't setting that night.

Mr. FREDERICK (of counsel for defendant). The women had gone to bed?

A. I reckon they had gone to bed.

Q. There was three women, and John, Wacoo, and Frank, making three boys that had gone to bed, and the other two men were setting up basting their shins by the fire.

The DISTRICT ATTORNEY. They were out of luck.

The WITNESS. I don't know whether they were basting their shins or not.

Mr. FREDERICK (of counsel for defense). The women had gone to bed; you don't know where they lived?

A. No, sir; I don't know where they lived.

The DISTRICT ATTORNEY. You do not care, do you?

A. No, sir; I don't care.

Mr. FREDERICK (of counsel for defendant). What time did you get up next morning?

A. We got up before daylight.

Q. You hustled out?

A. We went home.

Q. You, John, and Wacoo all went off together next morning?

99 A. Yes, sir; we did.

Q. What is the other girl's name that was there; Anna Blevins and who?

A. Laura Herring.

Q. Is she here?

A. No, sir.

Q. The other two are here?

A. Yes, sir; they are here.

Redirect examination by the DISTRICT ATTORNEY:

Question. About how long do you think it was before the killing that you and Wacoo and this defendant went down to Annie Hitchcock's that night you speak of?

A. I could not tell exactly how long; it might have been two weeks or it might have been not so long.

Q. You found Whitehead there, did you?

A. Whitehead came there after we got there.

Q. What time did you get there—before or after dark?

A. We went there before dark.

Q. What was your object in getting up so early in the morning and going home before daylight?

A. We just wanted to go home?

Q. Wacoo was on the scout at that time, was he not?

A. Yes, sir; Wacoo, he just got back from the Reform School, where they had sent him too; he wasn't much on the scout; he just went anywhere he wanted to.

Q. He carried a gun where he went to, didn't he?

A. He had a gun.

Q. Was John Brown armed that night?

A. I don't remember whether he was or not.

Q. You don't remember how that was?

A. No, sir.

100 Q. You just went down there to see the *the* people, did you? Was that your object?

A. We just went down to be going.

Q. Was Craig there that night?

A. No, sir.

Q. Do you know whether Wacoo and the defendant here had ever seen Whitehead before that night?

A. No, sir; I do not think they had even seen him.

Q. That was the first you had ever seen him?

A. Yes, sir.

Q. Did you know his business?

A. No, sir.

Q. You did not find out what his business was?

A. I never asked him what his business was.

Q. You didn't find out what it was?

A. No, sir; I never.

Recross-examination by Mr. C. J. FREDERICK:

Q. Were you armed?

A. No, sir; I wasn't armed.

Q. Was Whitehead?

A. I think he had a pistol on.

Q. You could not find out from Whitehead's actions w at he was after?

A. No, sir.

Q. He did not give himself away at all?

A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. You are a son of Dr. Hamilton?

A. Yes, sir.

Q. And he is here a witness for the defense, is he not?

A. Yes, sir.

Q. Is Monroe here?

A. No, sir; he is at home.

101 CHARLES LAMB, having been duly sworn, was called upon behalf of the Government, and, being examined by the district attorney, Mr. Wm. H. H. Clayton, testified as follows, to wit:

Question. I believe you are a deputy United States marshal?

A. Yes, sir.

Q. You arrested Jim Craig?

A. Yes, sir.

Q. See if this is the writ you had in your possession at the time you arrested him [handing witness a paper].

A. Yes, sir; that is it.

Mr. FREDERICK (of counsel for defense). What was the charge?

The DISTRICT ATTORNEY. Adultery.

Mr. FREDERICK (of counsel for defendant). It does not show who it was with?

The DISTRICT ATTORNEY. No; but the information does. I guess I can get the information.

Q. This is the writ you had in your possession?

A. Yes, sir.

Q. Please state if you arrested him.

A. Yes, sir.

Q. Where did you arrest him?

A. Around Annie Hitchcock's place, on Barren Fork.

Mr. GRACE (of counsel for defendant). We do not understand the relevancy of the arrest of Craig and we object to it.

The DISTRICT ATTORNEY. The relevancy is this: I desire to show that Craig was arrested for adultery with Annie Hitchcock; that he had made his escape; that after he had made his escape that the marshal got Poorboy as a posse to arrest him or to assist him in making the arrest of Craig; that Poorboy was with him a day or two looking for Craig after he had made his escape. I have already shown the purpose for which

102 Poorboy was down there in that country. He went there to arrest Craig. Craig is the paramour of Annie Hitchcock, and these murderers started out from her house. Her house was a rende'vous. They rende'voused at her house on the night of the killing. It was from her home they started out on this mission. Immediately after it was done they returned to her house. Craig returned to her house at midnight, after the shooting occurred, and was with these parties the next morning, according to the testimony of Frank Hamilton, who was just upon the stand. Now, then, he had been arrested a short time before that Craig had, and he had made his escape. This marshal had employed Poorboy to assist in making the arrest of these men. He came down that night and was at the father of this woman—at his house—when he was called out and shot. That is the relevancy of it.

The COURT. I think it is competent.

(Defendant excepts.)

The DISTRICT ATTORNEY. You arrested him at Annie Hitchcock's house?

A. Yes, sir.

Q. How long before the killing was that?

A. I think it was about 6 or 7 days before the killing; I didn't keep the dates; I made the arrest from the fact that he got away the next morning after I arrested him.

Q. I see you make the return on the 23rd of March?

A. Mr. Bruner made the return; that is when he brought him in the last time, when we recaptured him.

Q. You made no return on the writ?

A. No, sir.

The COURT. You made no return because he got away from you?

A. Yes, sir.

The DISTRICT ATTORNEY. You think this was about 6 or 7 days before the killing?

A. Yes, sir.

103 Q. When you arrested him what did you do with him?

A. When I first arrested him I brought him to Tahlequah, and there I put a guard over him while I was out feeding the horses, and the guard let him get away, and then I gathered up a squad, Mr. Poorboy and two or three others, and went over to Annie Hitchcock's, and we looked out there one day and night. He got away in the morning; we started immediately after him?

Q. How come you to get Poorboy to go with you?

A. I met up with Poorboy on the street and asked him if he would go, and he said he would. He said he was on guard for Mr. Paris, and he would go provided Mr. Paris would let him. I spoke to Mr. Paris about it. He is the sheriff, and he said that he could go, that he could spare two or three, and Poorboy and Charley Proctor both volunteered to go, and went with me.

Q. They both volunteered to go with you and assist in making the arrest?

A. Yes, sir.

Q. Poorboy, you say, was a guard there at Tahlequah?

A. Yes, sir; a guard under Mr. Paris.

Q. At the jail?

A. No; during council, if I remember right. The sheriff has on a good guard during counsil time.

Q. You went to Annie Hitchcock's. How many days did you look for him?

A. We staid there that day. He got away in the morning early, and we staid there that day and until the next morning—about 9:00 o'clock we left there. Poorboy was with me at Annie Hitchcock's on that trip. On the day that the killing took place, that night, on the 8th, I think it was—I am not positive about it—Poorboy, he go's back over there. I made an offer of $10.00 reward for the recapture——

Q. Who made it?

104 A. I did myself, for the recapture of Jim Craig.

Mr. FREDERICK (of counsel for defendant). We object to the offering of a reward for the capture of Jim Craig.

The COURT. I suppose that is merely to explain how Poorboy came to go.

The DISTRICT ATTORNEY. When was it you offered this reward?

A. I offered it on the evening that Poorboy went over there, but I had offered it different times before that; I offered it right immediately after we came back there.

Q. You say you offered it on the 8th?

A. Yes, sir.

Q. Did you see Poorboy on the 8th?

A. Yes, sir.

Q. Do you know what he went over there for that day?

A. He didn't tell me that he was going for that purpose, but it was my understanding that he was trying to get hold of Craig; he said he thought he could get him.

Q. How far is it from Tahlequah to Lord Shirley's or Judge Shirley's?

A. It is about 12 miles, I think, is what they call it.

Q. Did you see old man Shirley that day?

A. No, sir; I didn't see him. Which day do you mean?

Q. On the 8th?

A. No, sir; I never saw him.

Q. Do you know how Poorboy got over there?

A. He started from town horseback.

Q. You know of his leaving Tahlequah to go over there?

A. I know this: I left town before Poorboy did, but it was talked there betwixt me and Mr. Hitchcock that he was to go over there with Hitchcock.

Mr. FREDERICK (of counsel for defense). We object to any talk
105 between the witness and Hitchcock.

The DISTRICT ATTORNEY. Hitchcock was there at Tahlequah, was he?

A. Yes, sir.

Q. Do you know of anybody else offering a reward at that thime?

A. Mr. Hitchcock offered $10.00 reward.

Q. That is Annie Hitchcock's husband?

A. Yes, sir.

Q. That is $20.00 that was offered, you offering $10.00 and Hitchcock offering $10.00?

A. Yes, sir.

Q. You never saw Poorboy afterwards?

A. No, sir.

Q. Did you see him after he was killed?

A. No, sir; I saw his coffin; he was in the coffin, I suppose.

Q. Did you see Whitehead?

A. No, sir.

Q. Did you know him?

A. No, sir; I never saw him in my life that I know of at all.

Q. I believe you didn't capture Craig again?

A. He was recaptured by Bruner; I and Charley Copeland captured Craig the last time.

Q. Where did you find him at?

A. Annie Hitchcock's.

Q. The same place where you found him the first time?

A. Yes, sir.

Q. When was that?

A. On the 23rd night of March, I think.

Mr. GRACE (of counsel for defendant). We object to that. We think that is too remote.

The COURT. Yes; that is hardly competent.

Mr. GRACE (of counsel for defendant). We think it ought to be ruled out.

The COURT. Yes.

The WITNESS. I made a mistake; it was the 23rd night of Feb-
106 ruary that we recaptured Craig.

The DISTRICT ATTORNEY. There is a mistake, then, on the return, too. It is the 23rd of March and should be the 23rd of February.

The COURT. The 23rd of last month you recaptured him?

A. Yes, sir.

Cross-examination by Mr. C. J. FREDERICK:

Question. You never saw Whitehead in your life?

A. Not that I know of.

Q. Was Poorboy an officer?

A. Not that I know of; any more than he had be'n at work for me; I don't know whether that would make him an officer or not.

Q. He wasn't a regular posse of yours?

A. No, sir.

Q. You hadn't sent him off to make an arrest for you at the time he was killed?

A. Well, no; I had only offered a reward for the man.

Q. That would be for anybody that might see proper to make it; you didn't authorize him to go and make the arrest for you?

A. No, sir.

Q. Of course you didn't send Whitehead?

A. I didn't know him.

Q. How did you give notice you offered the reward; written notice, publish it?

A. No, sir; just told the parties we would give that. We never put up any forfeit.

The DISTRICT ATTORNEY. Did you tell Poorboy?

The WITNESS. Yes, sir; I told him I would give $10.00.

107 Mr. FREDERICK (of counsel for defendant). How many others did you tell?

A. There was Poorboy, Charles Proctor, and Sut Still, a boy that was riding with me regularly at that time; Brown Hitchcock also went over there and the fellow that let him get away, George Coon, the fellow that turned him loose or let him get away, I don't know which. He got away from him; I could not say how he got away.

108 E. H. BRUNER, having been duly sworn, was called upon behalf of the Government, and being examined by the district attorney testified as follows, to wit:

Q. You are the man they call Heck Bruner?

A. Yes, sir.

Q. You are a deputy marshal?

A. Yes, sir; I hold a commission under Col. Yoes.

Q. Do you know the defendant?

A. Yes, sir.

Q. Did you know Wacoo Hampton?

A. I never knew him until he was pointed out to me about ten days before he was killed. I knew him by reputation is all.

Q. Please state if you are the deputy marshal who arrested this defendant on the charge of murder.

A. Yes, sir; my posse and I arrested him.

Q. Do you remember when that was?

A. No; I don't remember the exact date. It strikes me it was about the 13th of February; I don't recollect the exact date. (Witness examines a paper from his pocket.) It was on the 29th day of January I made the arrest, the night of the 29th.

Q. Please state if you had seen the defendant after this killing and up to the time of his arrest, prior to that, between these times, between the time of the killing of Poorboy and Whitehead and the time you arrested him.

A. Yes, sir; I seen them one time is all the time I seen them that I could identify them.

Q. Where were they?

A. They were going to Annie Hitchcock's. They were not more than 100 yards from the house when I seen them.

Q. Did you have a writ for them then?

A. Yes, sir.

Q. You didn't arrest them then?

109 A. No, sir; there was three or four others with them then.

Q. Who were they?

A. I think one of them was Bald Christie, or thought so at the time; I didn't know; I only had one man with me, and the way the house was located I didn't think it was adviseable to try and make the arrest then.

Q. How far was that from Annie Hitchcock's house you saw the men?

A. At first I don't think they were over 100 yards.

Q. Where did they go?

A. They went in the house of Annie Hitchcock. They staid in the house, I guess, something like an hour, it appeared to me like; and they came out on the porch and went out of the house down towards the stable, and then went back into the house again.

Q. Please state if they were armed at that time.

A. Yes, sir; they had one Winchester we could see distinctly, and we thought they had another one; we were not positive at that time.

Q. When was that, how long before you arrested them?

A. I think it was something like ten days.

Q. Now, the next time you saw them was when you made the arrest, was it?

A. Yes, sir.

Q. Where did you find the defendant when you arrested him?

A. Found him at Sam Manus's; at the house in bed.

Q. Was Wacoo Hampton there?

A. No, sir.

Q. Where did you see him?

A. I saw him about three or four hours before that, I guess; it was just between sundown and dark; we run on to Wacoo Hampton something near a mile from there.

Q. Do you know where the Thornton house is?
A. Yes, sir.
Q. That is at the foot of the mountain?
A. Yes, sir; on Barren Fork.
110 Q. How far from the house was it you saw Wacoo?
A. About 150 yards above, next to the foot of the hill.
Q. Had he passed by the forks of the road yet?
A. Yes, sir; just passed by, probably ten feet or fifteen.
Q. Which road?
A. He taken the left-hand road going up the creek.
Q. That is the one you would take to go to Anna Hitchcock's?
A. Yes, sir; I knew nothing about that at that time.
Q. As you go down the mountain they take the left-hand road at the foot of the hill going east?
A. Yes, sir.
Q. That is where you had a fight with him?
A. Yes, sir.
Q. That is where he was killed?
A. Yes, sir.
Q. I will not go into that. The other gentlemen can if they want to. It was about dusk?
A. Yes, sir.
Q. Now, then, please state if after he was killed if you found any weapons upon him.
A. Yes, sir.
Q. What did you find?
A. Found two revolvers, is all.
Q. Do you know whether these revolvers belonged to him or not?
A. I know nothing only what was said about it that night.
Q. You had a fight there with him, did you?
A. Yes, sir; had a little shooting.
Q. You say it was some four or five hours after that until you found the defendant?
A. Yes, sir.
Q. You may go on and tell us all about his arrest particularly and minutely.
A. After we got Hampton there we taken him over to Hitchcock's and left him.
Q. Was he dead then or wounded, simply?
A. He was dead. He died in probably two minutes. We took
111 him over to Hitchcock's. After that we sent and got our horses; they were about two miles from there; went and got our horses, taken him over to Annie Hitchcock's and put him in the room there and left guards over him, and from there we went and got our supper, and then we went to Sam Manus's, and got to Sam Manus's, I guess, between 10 and 11 o'clock at night, and found Brown in bed there.
Q. Go on now and state all about it. Did he have any weapons there? Tell all about it.
A. One of the boys run into the front door——
Q. One of your posse?

A. Yes, sir; I went and tried to get into the back door, and it was fastened so I could not get in, and my posse run through the front room and into the back room, and Brown was in bed there, and I heard him hollo at him th throw up his hands, to Brown in there, and I run in there then, and I got in there just as he caught his hands and pulled him out of bed, and I taken the gun——

Q. You have not said anything about the gun yet?

A. He seemed to drop the gun then, kind of rolled off of his lap; he was setting up in bed, and the gun kind of rolled off his lap, and I picked up the gun, and the gun was laying on the bed in this position across him like he had tried to turn it around to shoot this way, and the posse told me afterwards he had——

Q. Never mind that.

A. The other gun—there was two, one was laying on the table, both Winchesters——

Q. Do you know which one of the Winchesters it was that he had on the bed?

A. I think it was the 44.

Q. What was the other?

A. A 38.

Q. Who did that belong to?

112 A. Said to belong to Wales Shirley. He told about having the gun; said he had seen him with it——

Q. Never mind that.

A. He wanted me to get the gun for him, and I told him I would if I could.

Q. That was the circumstances under which you arrested him?

A. Yes, sir.

Q. How big was the room that he was in?

A. The room was about 9 feet wide and probably 14 feet long.

Q. Was there anybody in the room with him?

A. No, sir.

Q. How far from the bed was the table upon which was the other gun?

A. Probably two feet and a half, not over that.

Q. Please state if the guns were loaded.

A. Yes, sir; both of them were loaded.

Q. How many shots in each?

A. I don't remember the number of shots, but one of them was nearly full, I remember that, and the other, I think, was full; the magazine was quite full.

Q. How many loads will this magazine hold?

A. Fourteen or fifteen.

Q. Which one was it that had the fourteen loads in it?

A. It was the 44.

Q. How about the other?

A. I think it only had 8; I would not be positive as to the number of shots it had in it.

Q. Do you know of your own knowledge what became of the 38 gun?

A. Yes, sir; I turned it over to Walles Shirley; he and others identified it as his gun, and I turned it over to him.

Q. Did you find any pistols there?
A. No, sir.
Q. What became of Wacoo Hampton's pistols?
A. They are up at my place.
Q. You have them yet?
A. Yes, sir.
Q. Was Sam Manus at home?
A. Yes, sir.
113 Q. How did you learn that the defendant was at that house?
A. We watched that evening; we could see them; we were up probably 300 yards of the house. We had watched them from there, thinking they would go in that direction; the reason we thought they would go in that direction was we had arrested Wacoo's brother the day before, and we thought they would go that way to see what become of these boys—we had arrested, Wacoo's brother and another young man. I understood from them they were to return.
Q. About what time was it in the evening that Wacoo came down to where you were?
A. It was between sundown and dark, just a little bit after sundown that he came down there.
Q. Did you know Craig?
A. Yes, sir.
Q. Had he been arrested the second time yet?
A. No, sir; he had been arrested, but he got loose from Lamb; he had not been rearrested.
Q. While you were up there had you ever seen him?
A. Yes, sir.
Q. Where did you see him?
A. At Anna Hitchcock's.
Q. When?
A. I saw him there two or three different times.
Q. After the killing?
A. Yes, sir; once after the killing; he says that I seen him twice after the killing, but I saw him only once that I could identify him. I arrested him there—no, I take that back, my posse arrested him.
Q. When was it you saw him at Annie Hitchcock's?
A. The night, I think, of the 22nd or 23rd of February.
Q. You are the one that they call Heck Bruner?
A. Yes, sir.
Q. Please state where you were on the night of the killing of Whitehead and Poorboy.
A. I was on my way from Claremore here.
Q. Had you been up there in that country?
114 A. I had been there frequently, but I hadn't within the last two or three weeks, that I remember of.
Q. You had been there before as a deputy marshal?
A. Yes, sir.
Q. You are known as a deputy marshal in that country? You travel inn that country?
A. Yes, sir; I know most everyone in that country.
Q. Did you know the defendant, Brown, prior to that time?

A. No, sir; I did not. I had seen him, but still I didn't know him.

Q. But you had been up through the country a good deal as a deputy marshal?

A. Yes, sir; I had seen him on two different occasions. I knew him by descriptions of him I had.

Q. Did Waeoo Hampton know you?

A. Yes, sir.

Q. You were not a deputy marshal when he was arrested and brought down here and tried?

A. No, sir; I saw him two or three times before he was arrested the first time, and then I seen him in jail two or three different times, and he knew me.

Q. This gun you got from the defendant, a 38 I believe, is the one you turned over to Walla Shirley?

A. Yes, sir.

Cross-examination by Mr. GEO. A. GRACE:

Question. Do you know where the defendant made his home about that time—where he was living?

A. No, sir.

Q. Where did you expect to find him when you went after him?

A. I had no idea where I would find him.

Q. Did you go to the Manus's to find him?

A. No; not at first I didn't.

Q. Did you know that he had been living there for some two
115 or three weeks?

A. No, sir.

Q. You had not heard that?

A. No, sir.

Q. Then you were very much surprised to find him in bed there at home, were you? You found him in bed at home, didn't you?

A. I don't know whether I did or not. I found him in bed at Sam Manus's.

Q. Waco Hampton's mother is Sam Manus's wife, is she not?

A. That is what I understand.

Q. You found Watt Hampton, his brother, there, didn't you?

A. No, sir; I didn't find him there.

Q. Where did you find him?

A. Found him across Barren Fork in the morning of the day before.

Q. Anyhow, you found the defendunt in bed at Sam Manus's?

A. Yes, sir.

Q. You went to the back door, it was closed, and your posse went in the front door; it wasn't closed, or did he break it in?

A. Yes, sir; he broke in.

Q. Found the defendant in bed?

A. Yes, sir.

Q. Before you left your side of the house you heard your posse tell him to hold up his hands?

A. About the time I started around there I heard him say to hold up.

Q. Back around towards the front door?

A. Yes, sir.

Q. You heard him say to hold up?

A. Yes, sir.
Q. Who was your posse?
A. Charles Copeland.
Q. Is Copeland here?
A. No, sir.
Q. Where is Copeland?
A. I can't tell you.
Q. Where did you last hear from him.
A. He was here two or three days ago—brought down a prisoner.
116 Q. Are you able to say that the defendant tried to resist, or tried to use the gun on your posse?
A. Yes, sir; I think I am.
Q. You ought not to think.
A. I will tell you what I know, and then you can see why I think so. As I was going around the house he said, "Drop that gun, God damn you, drop it quick! quick! quick!"
Q. Who said that?
A. Copeland. I heard him say that distinctly as I come into the house.
Q. You did not think of that before?
A. I thought of it a number of times before.
Q. On your examination-in-chief, you say you heard him tell him to hold up there, and now you say you heard him say a regular doxology besides?
The DISTRICT ATTORNEY. Doxologies are always short.
Mr. GRACE. (Of counsel for defendant.) Why didn't you tell that at first?
A. I wasn't asked.
Q. You didn't think it was of any importance, I suppose. When you went in there he had the gun pointed on your posse, I suppose?
A. No, sir; I didn't say that.
Q. How was that?
A. As I went in he had his hand out this way, pulling this direction, the posse was, and pulled him out of his bed just as I got inside of the door there. Had hold of the man's hand, and the gun rolled off his lap on the bed.
Q. Pulling him by the hair?
A. By the hand. When he put his hand up that way he grabbed his hand and pulled him out, so he told me; he had him by the hands when I got there, and pulled him out of the bed.
Q. You know the difference between what you see what your posse told you, do you not?
A. Yes, sir.
117 Q. Well, please observe the difference. He pulled him out of bed, and then you saw the gun. Where was the gun when you saw it?
A. On the bed, on his lap, laying across his lap.
Q. He was pulling him out of bed in a kind of sitting position?
A. Yes, sir; seemed to be.
Q. Did he pull him out backwards or forwards?
A. Sideways.

Q. That gun, you say, was a Winchester?
A. Yes, sir.
Q. Who did you give that too?
A. Wales Shirley.
Q. Is that Judge Shirley's son up there?
A. I don't know; I think so; that is my understanding.
Q. It wasn't the defendant's gun; you didn't consider it the defendant's gun, and so you turned it over to Shirley?
A. No, sir; I didn't turn that gun over to Shirley.
Q. I thought you said you did?
A. No, sir.
Q. What did you do with this one you took from Brown?
A. I have got it yet.
Q. Where was the 28 gun you speak of laying; on the table right beside him?
A. In the house there, pretty close to him.
Q. Was there anybody else in the room besides him?
A. No, sir.
Q. What size room was it?
A. The room, as well as I remember, was something near 9 feet wide, and about 14 or 16 feet long.
Q. Who else was in the house?
A. Sam Manus was in the front room, and Ben Knight was in the front room, and Sam Manus's wife and 2 or 3 children were in the front room.
Q. Any one else in the room?
A. Ben Knight went there with me.
Q. He wasn't staying at the house then?
A. He was in the house when I went in.
Q. Then you had two posses along?
118 A. No, sir; he holds a commission as a deputy, I think.
Q. He was along with you then?
A. Yes, sir.
Q. Then Sam and his wife and three children were the only persons in the house when you went there except the defendant, as far as you know?
A. Yes, sir.
Q. You brought the defendant on down here, I suppose?
A. Yes, sir.
Q. The defendant wasn't with Wacoo Hampton when you arrested him?
A. No, sir.
Q. Was he along with Wacoo when you killed Wacoo?
A. No, sir.
Q. Was there anybody with Wacoo?
A. No, sir; he was by himself.
Q. Was he riding or walking?
A. Riding.
Q. So far as this killing of Poorboy down there is concerned you know nothing about it, except what you have heard?
A. That is all.

Q. Were you in that country at all between the time Poorboy was killed until the time you went up there to arrest these parties? When did you go back in that country?

A. Yes, sir; I have been back in that country several times since that looking for these parties; three different times, I think.

Q. How old a boy was Wacoo?

A. I could not tell you; I think about 17 years old; something near that, the best I could learn.

Q. Do you think he was 17?

A. Yes, sir; 17 or 18

Q. He was an Indian, was he not?

A. Yes, sir; a Cherokee.

119 WALER SHIRLEY, having been duly sworn, was called upon behalf of the Government, and being examined by the district attorney, testified as follows, to wit:

Question. You are Judge Shirley's son, are you not?

Answer. Yes, sir.

Q. You are a brother of Mrs. Hitchcock?

A. Yes, sir.

Q. Do you remember the night when Poorboy and Whitehead were killed down there at your father's house?

A. Yes, sir.

Q. Were you at home that night?

A. Yes, sir; I was at home, very sick.

Q. I will ask you if you saw that day Mr. Hitchcock and Mr. Poorboy?

A. Yes, sir; I saw th'm that evening.

Q. What time?

A. It was just sometime after sundown, I suppose half an hour.

Q. Where did you see them?

A. They came to my house.

Q. What was their business?

A. In the first place I had sent Mr. Hitchcock to town that morning after some medicine for me.

Q. To what town?

A. Tahelquah.

Q. Did he bring it?

A. Yes, sir; he brought the medicine that evening a little after sundown when he came in.

Q. Then what?

A. Mr. Poorboy was with him when he came back.

Q. Please state if Mr. Poorboy or Mr. Hitchcock either got any guns from you or pistols that night.

A. Yes, sir; Mr. Hitchcock borrowed my Winchester for Mr. Poorboy.

Q. What kind of a gun was it?

A. A Winche-ter rifle, size 38.

Q. What did Poorboy want with it?

A. I understood they wanted to arrest Jim Craig that night, as well as I remember.

120 Q. What did Mr. Poorboy do after he got the gun?
A. He went away right immediately.
Q. What did Mr. Hitchcock do?
A. He staid there with me, set up with me that night.
Q. Did you let them have any other weapon except the gun?
A. No, sir; that was all.
Q. Please state if at any time during the night you heard any firing.
A. Some time after Poorboy left, I could not say exactly how long it was, I heard shooting right opposite the house up at the road; I lived a off of the road.
Q. About how long do you think that was after he left?
A. I think it was an hour and a half; I think about that time.
Q. Where was the shooting?
A. It was right even with the house; right up the road, it seemed like.
Q. You were at your own house?
A. Yes, sir.
Q. How far do you live from your father's?
A. About two miles.
Q. What direction?
A. Well, it is, I guess, north.
Q. A little northeast, is it not?
A. Maybe it is a little east of north.
Q. How far do you live from the road?
A. About 300 yards.
Q. Did you hear anybody say anything?
A. I could hear some talking; I could not tell who it was. The parties seemed to be passing down the road in the direction of where my father lived.
Q. Please state if you heard any shooting; and if so, how long afterwards after they passed?
A. It was between three-quarters of an hour and an hour, I should judge.
Q. How much shooting did you hear?
A. I declare I could not tell you; it seemed like to me there
121 was 25 or 30 shots fired; it was all done mighty quick.
Q. In what direction?
A. It was south of west.
Q. Towards your father's house?
A. Yes sir.
Q. About what time of night was that?
A. Well, sir, I judge it to be between ten and eleven o'clock, or ten o'clock, at least.
Q. Was Mr. Hitchcock awake when these parties passed?
A. Yes, sir.
Q. He is your brother-in-law?
A. Yes, sir.
Q. When did you learn first that these men were killed?
A. There was a little boy came up from my father's, and told us about it—a little orphan boy he is raising; that is the first we knew anything about the killing.
Q. Please state if you ever got that gun back again; and if so, when?

A. Yes, sir; I got the gun back after these boys were captured.
Q. Who gave it to you?
A. Mr. Bruner, the marshal. I think the boys were captured on Saturday, and I got the gun again next Monday, as well as I remember.
Q. It was the same gun again, was it?
A. Yes, sir.
Q. Bruner is the deputy marshal who returned you the gun?
A. Yes, sir.
Q. That was after this defendant had been captured?
A. Yes, sir.
Q. That was a 38 gun, you say?
A. Yes, sir.
Q. The gun that Bruner gave you is the same gun that Mr. Hitchcock had borrowed of you for Mr. Poorboy the night he was killed?
A. Yes, sir.
Q. And to arrest Jim Craig with?
A. That was my understanding.
122 Q. Just opposite your house there was one shot fired?
A. Yes, sir.
Q. You were present when I drew this map?
A. Yes, sir.
Q. You live on the left-hand side of the road, going up?
A. Yes, sir.
Q. These parties were going south?
A. Yes, sir they seemed to be going south.

Here court adjourned until Saturday a. m., 8:30 o'clock, A. D. 1892.

123 SATURDAY MORNING, *March 19th*, 1892—8:30 o'clock.

Mr. BROWN HITCHCOCK, having been duly sworn, was called upon behalf of the Government, and, being examined by the district attorney, testified as follows, to wit:

Question. You are the husband of Annie Hitchcock?
A. Yes, sir.
Q. Do you know this defendant?
A. Yes, sir; I have seen him; I am not personally acquainted with him.
Q. Did you know Wacoo Hampton?
A. Yes, sir.
Q. Were you acquainted with the men who were killed, Whitehead and Poorboy?
A. Yes, sir.
Q. Please state if you saw Josiah Poorboy on the day he was killed.
A. Yes, sir; I was with him the greater part of that day.
Q. Where did you first see him?
A. It was in Tahlewuah somewhere.
Q. Where were you living at that time?
A. I was making my home at Vinita.
Q. Were you living with your wife?
A. No, sir.
Q. How long had it been since you left your wife?

A. I had not lived with her since about the 28th of June, I think, before that.

Q. That would be June, 1891?

A. Yes, sir.

Q. How many children have you by her?

A. Three.

Q. How old is the oldest?

A. He will be 10 years the first of May.

Q. You were living at Vinita the time of the killing?

A. Yes, sir.

Q. You saw Poorboy at Tahlequah the day of the killing; what
124 time did you first see him?

A. Well, it was about noon, I think; not far from noon.

Q. Please state what you did.

A. Poorboy and myself in company with Sut Still ——.

Q. Who is Sut Still?

A. Posse for Charles Lamb, deputy marshal.

Q. Where did you go?

A. We started to go to Barren Fork.

Q. That is where Annie Hitchcock lives?

A. Yes, sir.

Q. What is the business of Sut Still and Poorboy, if you know?

A. They were going to attempt to capture a man named James Craig.

Q. Please state if you know James Craig.

A. Yes, sir; I knew him.

Q. Do you know whether there were any rewards offered for his arrest?

A. Yes, sir; there was.

Q. Who offered the reward?

A. Mr. Lamb offered a reward of $10.00, and I offered a reward of $10.00.

Q. He was charged with adultery with your wife, was he not?

A. Yes, sir.

Q. He had already been arrested and escaped?

A. Yes, sir.

Q. They started away that day for that purpose; what did you go for?

A. I went to take the medicine to my brother-in-law, who was sick.

Q. What is his name?

A. Waler Shirley. That was my business at Tahlequah that day; I went after medicine for him.

Q. Now, then, go on and state where you went.

A. We went in the big road towards Barren Fork.

Q. You went to Barren Fork?

A. Yes, sir.

125 Q. You went to Waler Shirley's, I suppose?

A. Yes, sir; Poorboy and myself both went there that night.

Q. What became of Sut Still?

A. He left us near the Boudinot place.

Q. Where is that?

A. That is about 4 miles, I suppose, maybe a little over four miles from Tahlequah; he left us and started back to Tahlequah.

Q. Why didn't he go on with you?

A. We met three parties at Boudinot Spring and stopped and had a conversation with them, and we learned from these parties that the party that Poorboy and Whitehead were going after were at Sam Manus's.

Q. You learned that?

A. Yes, sir.

Q. That Craig was at Sam Manus's?

A. Yes, sir.

Q. Why did Still leave?

A. He went back to get a posse of men to come and help take Craig.

Q. You and Poorboy then went so Waler Shirley's?

A. Yes, sir; Sut Still instructed us to go by the way of John Shirley's and get John Shirley to meet the posse at old man Shirley's that night, and that they would all go together, come in from the south on to Sam Manus's house.

Q. That was the arrangement that was made?

A. Yes, sir; that was the understanding.

Q. By the order of Lamb?

A. Yes, sir; Still; he was the one that would have the body under control.

Q. You, Still, and Poorboy left Tahlequah about noon?

A. We left after noon sometime.

Q. Did you go by John Shirley's?

A. Yes, sir.

Q. Did you get him?

126 A. We told him what the agreement was, and he said that he would meet us there if he could possibly go, but he said he did not have any gun; there was a man named Root there, and he had a Winchester leaning up against a tree, and told him maybe he could get that one, and he said he would try, and if he could not he would try to come anyhow.

Q. Did Poorboy have any gun?

A. He had a pistol.

Q. Then you went on where?

A. We went on to old man Shirley's first.

Q. Then where?

A. And from there we went to Waler Shirley's. Poorboy didn't get down off of his horse at the old man's. I got down and went in the house; it was dusk when we got to John Shirley's; John was feeding.

Q. Did you see anything of Whitehead there?

A. Yes, sir; I saw Whitehead there; he was in bed, sick.

Mr. GRACE (of counsel for defendant). That was at Judge Shirley's, was it?

A. Yes, sir.

The DISTRICT ATTORNEY. He was sick in bed?

A. Yes, sir; he had fever; I went up to him and felt of his head, and asked him how he felt, and he said he felt very bad; had a chill and had fever.

Q. From there you went to Waler Shirley's?

A. Yes, sir; it was getting dark when we got to old man Shirley's.
Q. How far does John live from Judge Shirley's?
A. About 2 miles, a little east of south.
Q. Waler lives about two miles northeast?
A. Yes, sir; not quite two miles.
Q. That makes John and Waler living about 4 miles apart?
A. Nearly so; about equal distances from the old man's.
Q. One up Barren Fork, and the other down?
A. Yes, sir.

127 Q. When you got to Waler Shirley's Poorboy was with you was he?
A. Yes, sir.
Q. Please state why he went with you up there?
A. He went up there with me to get Waler Shirley's Winchester.
Q. Did he get it?
A. Yes, sir.
Q. What kind of a one was it?
A. It was a 38 Winchester.
Q. New one?
A. Nearly new; hadn't used it much.
Q. How long did he remain there?
A. We put up our horses, both of us; he put up his horse and fed it, and we went in the house and Waler's wife fixed us some supper and we both went into the kitchen and eat supper, and then we came back into the room where Waler was sick and set there and talked some little length of time before he started.
Q. You say it was dark when you got there?
A. It was dark when we got to old man Shirley's.
Q. Then you went two miles further, fed your horses, got supper and the Winchester, talked a little while, and he left?
A. Yes, sir.
Q. Did he take the gun with him?
A. Yes, sir; he took the Winchester with him and my pistol.
Q. It was your pistol that he had, then?
A. Yes, sir; I let him have a pistol while we were in Tahlequah.
Q. Have you ever got your pistol back?
A. No, sir.
Q. Have you ever seen it since?
A. No, sir; I have heard of it, but I have not seen it.
Q. What occurred after Poorboy left?
A. Poorboy went on back, and we were all setting up with Waller, and it was a good long while after he left; it must have been an hour
127½ and a half or two hours; we were all in the house, and we heard some parties as if they were carousing and drinking.
Q. Where were they?
A. Sounded like they were back of Waler's field, towards the mountain, in the south direction from Waler's house, towards Cob Hill.
Q. The road is southeast?
A. The road runs around Waler's field there.
Q. Did it sound as if it was at the road?
A. They sounded like they were at the big road.

Q. Which way were they going?

A. We could not tell when we first heard them where they were going to; they kept on coming nearer; that is, the sound kept coming nearer; they were carousing and whooping and holloing, and presently there was a pistol or a gun fired about the corner of Waler's field; you could tell then they were moving in the direction of old man Shirley's. A man by the name of George Harlan was setting up with us, and about the time the pistol fired he said he would go out and listen at them.

Q. They went on passed there?

A. Yes, sir.

Q. State what occurred after that.

A. The noise gradually decreased on down the road towards the old man Shirley's, and they had been gone about the length of time it would take a person to go down as far as my house, or the old man Shirley's, and we heard the shooting.

Q. How many shots; could you give an estimate?

A. There was between 20 and 30 shots fired; I don't think there were less than 20 or over 30.

Q. How were they fired?

128 A. They were fired in a volley, just as fast as they could be fired, for I do not think the whole occurrence took over a minute. After a little interval, just a short space after the body of the shooting was done, there was two separate shots fired; these two shots sounded like they were muffled shots there in the house, or right near the house. I know we spoke of it at the time, about the shots being fired.

Q. That is all the occur'ences of that night pertaining to this matter?

A. Yes, sir; that I know of.

Q. When did you learn that Poorboy and Whitehead had been killed?

A. Very early the next morning.

Q. How did you learn it?

A. A little boy by the name of Bill that old man Shirley is raising came to the house and told us that Whitehead and Poorboy were both killed and lying in the road.

Q. Did you go down there when you were told?

A. Yes, sir; I went as soon as we eat breakfast.

Q. What did you find?

A. I found both of the boys, Poorboy and Whitehead, lying in the road as he had said, dead; at least Poorboy was right in the middle of the road and Whitehead right at the edge of the road.

Q. Any weapons or arms there with them?

A. No, sir.

Q. Poorboy had a gun and a pistol, your pistol, and Walter Shirley's gun?

A. Yes, sir; those were the weapons that he had.

Q. Of course, you do not know what weapons Whitehead had, if he had any at all?

A. I don't know what he had at that time; I know what the gun was sent down there for.

Q. What for?

A. For Whitehead.

Q. The pistol was for Poorboy and the gun for Whitehead?

A. Yes, sir.

129 Q. When they made this arrangement was there anything said about what time they should meet at Shirley's in order to go up to Sam Manus's to make this arrest?

A. Just as soon as Sut could possibly get over to Mr. Lamb and get back to Ta'lequah and raise a posse and come they would come just as soon as they could.

Q. What did you do with the bodies?

A. I taken the bodies to Tahlequah in the old man Shirley's wagon, and turned them over to Bob French, U. S. deputy marshal.

Q. Did you see the wounds upon the parties?

A. Yes, sir; I seen all the wounds after they had a kind of a coroner's inquest over the bodies in Tahlequah. They call me in to examine them and to indentify the bodies; they had them stripped and the wounds exposed.

Q. State where the wounds were. Take Whitehead first.

A. Whitehead had a bullet hole right in his forehead, went through the head, and the brains were all running out of the forehead, and he had a hole right in his neck.

Q. Where did the bullet hole in his forehead come out?

A. It came out in the back of his head; I don't remember whether it was straight through or not.

Q. Brains running out of the wound in front?

A. Yes, sir.

Q. You speak of one on the neck?

A. He had one in the neck, just right back of what we call the Adam's apple. It just seemed it was right in under the Adam's apple; it looked like two balls had went through at once. It was large enough, it looked like, to put two fingers through the hole, clear through.

Q. Running from left to right, or right to left?

A. I could not tell; it was just simply right straight through.

130 Q. Was the wound a round wound or up and down?

A. It looked like two balls had went through it; it looked like you could put your fingers through here; and he had one other one.

Q. Where was the other one?

A. Right down in the pit of the stomach, and when the doctors hunted for that ball they found it back up in the left shoulder blade here; they cut him open here and took it out in front.

Q. In about the navel?

A. It was below the navel, and ranged upward. I saw that ball after it was taken out.

Q. Did he have any other wounds on him?

A. That is all I saw.

Q. He had three wounds?

A. Yes, sir.

Q. Describe Poorboy's wounds.

A. Poorboy had one wound that went in about the upper lip, below the nose, and went through the head; I could not tell exactly where it came out; and he had one wound in his left arm. I believe that he had four wounds in his body, and I can not exactly locate where these four wounds were.

Q. In the trunk of his body?

A. Yes, sir; there was three balls cut out of his back that didn't go through; they bulged the skin out, and I believe that one of the balls that went into his body went clear through it; I think it went clear through it.

Q. He was shot six times?

A. Yes, sir.

Q. That is, 9 shots in the two?

A. Yes, sir; nine wounds in the two; and the horse one wound; that made ten.

Q. Was it Poorboy's horse that was shot?

A. Yes, sir.

Q. And Roach was shot?

A. Yes, sir.

Q. That is eleven accounted for?

A. Yes, sir.

Q. What time of night was it that this shooting occur'ed, do you think?

131 A. Well, we had no means to tell, but I think it must have been nearly 10 o'clock, or close onto 10 o'clock, when the shooting occur'ed.

Q. Were there any empty hulls found there at the bodies?

A. Yes, sir.

Q. Do you know how many?

A. I do not know for certain how many, but what other parties told me that picked up, I counted 23.

Q. Never mind what other parties told you; how many did you see?

A. I don't recollect how many I saw; I think I saw 8 or 10, I think it was, laying by the end of the log near Whitehead; between the log and the fence.

Q. Did you, yourself, get any of the hulls?

A. I got several, but I put them back; didn't carry them off at all.

Q. Did you observe where any bullets had gone into the fence or house or stable, or anywhere, or did you look?

A. I didn't look.

Q. When was it that this thing occur'ed?

A. On the night of the 8th of December.

Q. Last December?

A. Yes, sir.

Q. In the Cherokee Nation, Indian country?

A. Yes, sir.

Q. You say you knew Craig?

A. Yes, sir.

Q. How long since you had seen him before he was arrested?

A. I saw him on the 16th of November, I think.

Q. Where?

A. In Tahlequah.

Q. That is the last time you saw him?

A. Yes, sir; I think it was the 16th of November; I would not be positive about the date, but any way it was along there somewhere not far from that date.

Q. Do you know who filed complaint against Craig for adultery
132 with your wife?

A. Yes, sir; I did it myself.

Q. I believe you have a suit pending for divorce, have you not?

A. Yes, sir.

Q. At Muskogee?

A. No, sir; in the Coo-wee-scoo-wee district; I am a resident of that district.

Q. In the Cherokee courts?

A. Yes, sir.

Q. You say you filed information against her and Craig?

A. Yes, sir.

Q. Is Craig a white man or an Indian?

A. White man.

Q. Your wife is an Indian?

A. Yes, sir.

Q. Do you know where Craig is now?

A. I suppose he is here in jail; I have not seen him since he left the commissioner's office.

Cross-examination by Mr. FREDERICK:

Q. Are you a white man or an Indian?

A. I am a Cherokee by blood.

Q. Your wife is a Cherokee?

A. Yes, sir.

Q. Is Craig a young man?

A. I think he is about 22 years old.

Q. You filed complaint against him here in this court?

A. Yes, sir.

Q. For adultery with your wife, you say, did you?

A. That is what I said.

Q. Has Craig been living at your house?

A. Not that I know of.

Q. Didn't he stay at your house? Don't you live at home?

A. No, sir; I do not.

133 Q. How long have you been away from home?

A. Since last June.

Q. Where did you leave her, your wife?

A. At home.

Q. You left home last June, did you?

A. Yes, sir.

Q. Craig didn't live at your house before that?

A. No, sir.

Q. Didn't come to your house and stay at your house?

A. He had been to my house many a time.

Q. Working for you?

A. I don't think I ever had him hired; I may have had him hired for a day or two at a time. I have had him there to help me kill hogs.

Q. He would come to your house as a visitor, then?

A. Oh, he was one of the neighbors, and he would come just as any other neighbor would.

Q. Is that the reason you left home, because he came there as a neighbor?
A. I don't know that I have to tell why I left home.
The DISTRICT ATTORNEY. Go on and tell it.
Mr. FREDERICK (of counsel for defendant). That is the reason you left home?
A. Do I have to tell my family matters in this case?
The COURT. Go on and tell it; it is no disgrace.
The DISTRICT ATTORNEY. Of course it is unpleasant, but go on and tell it.
The WITNESS. I left home because me and my wife could not get along.
Mr. FREDERICK (of counsel for defendant). You did not leave home because Craig was coming there?
A. I didn't say that I did.
Q. Did you leave home because he came to your house?
A. No, sir; that was not the reason.
133½ Q. You made no charge against your wife before you left home?
A. Not in this court.
Q. You made no charge against her of adultery, or had no complaint of adultery against her with Craig since you left home?
A. I made no charges in the law.
Q. Did you leave her because of any jealousy between you and her on account of Craig?
A. I left her because she had been intimate with other men.
Q. With Craig?
A. Craig was one of them.
Q. Before you left home?
A. Yes, sir.
Q. That is the reason you left home?
A. That was the only reason; there was no difficulty between me and my wife that caused me to leave home.
Q. What I am wanting to get you to say is whether the complaint against your wife was with regard to her conduct between her and Craig?
A. Not altogether.
Q. Was that any part of it?
A. Yes, sir; part of it.
Q. Why did you allow him to visit your house if you had such feelings towards him?
A. Because I did not want to run him off from there.
Q. Why didn't you forbid him to come to your house if you thought he was violating your bed?
A. The reason I didn't answer your question that way, because I have been answering that ten thousand times all through this case, why I left my wife.
Q. Why didn't you stay there and protect your wife's virtue; you are her husband?
The DISTRICT ATTORNEY. That is a mighty hard thing to do.
Mr. FREDERICK (of counsel for defendant). You were friendly
134 with Craig when you left home in June?
A. No, sir.
Q. How long had you been unfriendly with him?
A. Nearly two years.

Q. Yet you allowed him to visit your house as a neighbor?
A. He hadn't been in that country——
Q. For nearly 2 years?
A. I expect so.
Q. Then he had not been around about your house for two years?
A. About 18 months.
Q. Do you tell this jury that you left her because of jealousy existing between you and her in regard to Craig, and he had not been there for 18 months?
A. I said he had not been in the house for 18 months.
Q. Wasn't in the country?
A. He might have been in the country.
Q. You said he wasn't.
A. They carried on correspondence together all the time.
Q. Did you see the correspondence?
A. Yes, sir; one of it.
Q. Dif you forbid it?
A. Yes, sir; I got promises it would stop. If you want to know all, I wrote him a letter telling him to quit writing to my wife.
Q. It must have been before this that he was visiting your house?
A. He has been living there in that neighborhood before that.
Q. How long ago?
A. Nearly three years ago since he commenced to fool around.
Q. You have some children?
A. Yes, sir; I have three.
Q. Did you take them with you?
A. No, sir.
Q. Why?
A. I didn't care to take them away from home.
Q. Your wife was not fit for you to live with, according to
135 your idea; she *she* fit for your children?
A. No, sir; she wasn't.
Q. Why didn't you take possession of them?
A. I will when I get possession of them by the law.
Q. You didn't try to take care of them?
A. I do try; I sent my wife money all the time up to last November. The reason I left home was to give her a chance to reform, because she claimed my presence at home there was the cause of her acting up that way.
Q. You left home and was gone 6 months; you thought she could reform in 6 months?
A. I sent her money all that time up to November.
Q. What evil effects did you have on your wife?
A. She claimed my company was the cause of it—me being there.
Q. You thought by going away she would reform?
A. Yes, sir; I was fool enough to believe it at that time.
Q. You do not believe it now?
A. No, sir.
Q. How long had you known Whitehead?
A. I had known Whitehead about a week before the killing.
Q. He was a white man?
A. He said he was; looked like one.

Q. He was a young man?
A. About the age of the defendant; looked like.
Q. You sent him down there to look after your wife, did you?
A. I didn't send him down there.
Q. Didn't you send him down there to catch Craig?
A. No, sir; I did not.
Q. Didn't you tell him you would give him a reward if he would catch Craig?
A. That was the marshal that sent him there.
Q. Didn't you offer to give him ten dollars if he would catch Craig?
136 A. No, sir; I offered the reward to the marshal. I would give it to anybody who would catch him.
Q. You had only seen Whitehead about a week before he was killed?
A. Yes, sir.
Q. He was a stranger in that country, was he not?
A. I guess so; that was the first time I had ever seen him.
Q. Do you know how it happened that Whitehead went down to your wife's?
A. Yes, sir.
Q. How did you know as long as you didn't talk to him?
A. I didn't say I didn't talk with him.
Q. Did you talk with him?
A. Yes, sir; I did.
Q. You didn't send him down there; didn't tell him to go down there?
A. I didn't send him down there.
Q. Did you tell him to go down there?
A. I didn't send him over there.
Q. Then you did tell him to go, did you?
A. I don't remember the conversation that passed between us.
Q. Did you talk with him about it?
A. I did; emphatically did.
Q. But you did not tell him you would give him any reward, or you did not send him down there?
A. No, sir.
Q. Did you know he was going down there?
A. I did.
Q. You did know it?
A. Yes, sir.
Q. He told you he was going?
A. Yes, sir.
Q. Did he ask your permission to go?
A. I don't know as he needed my permission to go; he wasn't going to my house.
Q. How do you know?
A. Because I know he wasn't.
Q. He did go there, didn't he?
A. He went to my house after he went to where he was going.
137 Q. Where was he going?
A. Now you are getting to it. I will tell you; he was going to the old man Shirley's.
Q. That is about a quarter of a mile from your house?

A. Yes, sir.
Q. Where did you first see Whitehead?
A. In Tahlequah.
Q. Did you talk with him up there about your wife and your domestic affairs?
A. No, sir.
Q. Where was it you talked with him about your affairs?
A. At old man Shirley's.
Q. How long before Whitehead was killed?
A. On Sunday, I believe.
Q. He was killed Tuesday night, was he not?
A. Yes, sir.
Q. You had never talked with him about your affairs until Sunday?
A. We never went into any detail.
Q. Had you ever talked with him at all about it before Sunday?
A. I had talked to him about capturing Craig; that was all.
Q. Where?
A. At Tahlequah, before we started.
Q. I suppose you told him what you wanted to capture him for?
A. He knew what the reward was for, I guess; he was an escaped prisoner.
Q. You say he knew; how do you know; you didn't talk with him about it; how do you know that he knew?
A. In the first place, if you want me to tell you about it, I will have to go back and tell you the whole thing, if you want that question answered.
Q. I don't want you to go back. Did you talk with him about it at Tahlequah?
A. I talked with him about capturing Craig.
Q. Did you tell him for what purpose?
A. Because he was an escaped prisoner.
Q. Did you tell him for what he was wanted?
A. He knew that.
138 Q. Do you know that he knew it?
A. The man that got him to go over there told him all about it.
Q. Did you hear him tell him about it?
A. The man had told me.
Q. You never did talk with him about it up there at Tahlequah?
A. About my wife and family affairs?
Q. Yes, sir.
A. No, sir; I did not.
Q. You knew he was going down to Judge Shirley's?
A. Yes, sir.
Q. You didn't know he was going down to your wife's?
A. I supposed that he would go there; I didn't know that he would.
Q. Do you know why he would go there of nights and not in the day time?
A. Yes, sir; I do.
Q. How do you know it; how do you know why?
A. Because Whitehead told me himself why he went there in the night.
Q. When did he tell you?

A. He told me on Sunday, and he told me on Monday why it was that he went there in the night inst'ad of the daytime. Do you want to know why?

The DISTRICT ATTORNEY. No; he does not want to know why.

Mr. FREDERICK. I did not ask you to tell me what Whitehead said; I asked you if you knew why he went down there, and you said you knew what he said.

A. I answered your question.

Q. The district attorney interposes by saying maybe I didn't want to know.

A. I will answer if you want to know.

Q. Didn't you go down to your wife's house Sunday, Monday, and Saturday before this killing?

A. I went there sometime during the week before; I was there right at the yard fence; I didn't go in the house.

Q. Did you take Whitehead with you?

A. No, sir.

Q. Did you send a gun down to Whitehead?

A. Yes, sir.

139 Q. What did you send it for?

A. Because he was going with this marshal posse to help catch Jim Craig.

Q. I guess that marshal has got a name, has he not?

A. I guess he was going with Sut Still; Sut Still was to meet him there that night.

Q. Had you seen Sut Still?

A. Yes, sir.

Q. He didn't come, did he?

A. I guess he didn't; I didn't see him.

Q. I thought you told us awhile ago that Whitehead was sick in bed at Judge Shirley's?

A. He was.

Q. What did you think a man with a fever on him would want with a Winchester?

A. If you had known Whitehead you would not have asked that question.

Q. You just told us a while ago that he was sick in bed with a fever on him. What did you think that the man would want with a Winchester when he was in bed sick?

A. I would think that if he had any hopes of catching that man he would have crawled to catch him, if he was sick.

Q. And you only had known him a week?

A. Yes, sir; one week.

Q. A stranger in the country?

A. I had seen his actions, though, and knew what he was.

Q. Had you employed Poorboy to do the business for you?

A. I hadn't employed anybody.

Q. Had you told him you would give him $10.00 to catch Jim?

A. No, sir; I didn't promise any certain individual; I was to pay a reward.

Q. How did you promulgate that reward?

A. By word of mouth, through Mr. Lamb and his posse; I didn't
140 publish it; I just done it by word of mouth.

Q. You didn't tell Poorboy of that then?

A. I think Poorboy heard Lamb ask me if I would give $10.00 when he said he would give $10.00; I think Poorboy was right there then.

Q. Was Poorboy a posse?

A. I didn't say so.

Q. You said Lamb's posse, the marshal's posse?

A. Sut Still; these other men were under Sut Still.

Q. Which other men?

A. Poorboy and Whitehead.

Q. Who is Sut Still; what position does he hold?

A. He was Lamb's posse.

Q. What were Poorboy and Whitehead?

A. I guess you might call them guards.

Q. Guards of what?

A. Searchers, hunting for men.

Q. They were guards whenever they were employed as guards, I suppose, only. Sut Still was not down there that night, and Lamb was not down there, was he?

A. No, sir.

Q. There was no marshal down there that you saw, did you?

A. No, sir.

Q. Then you simply saw Whitehead that had been in the country about week, and Poorboy that had been a guard for somebody, and you call them officers, do you?

The DISTRICT ATTORNEY. He did not say they were officers.

Mr. FREDERICK (of counsel for defendant). What were they if they were not officers?

A. I was an officer, and so was Poorboy an officer at the time. Both of us were officers.

Q. What officer were you?

A. We were guards for the Ta'lequah district.

Q. You were?

A. Yes, sir; both of us.

141 Q. But not Whitehead?

A. No, sir; he was a white man.

Q. You being a guard, why didn't you go?

A. I told you I was setting up with my sick brother-in-law.

Q. That is the reason you did not go?

A. Yes, sir.

Q. These men were not hunting John Brown, were they?

A. No. sir.

Q. And they were not hunting John Roach, were they?

A. No, sir.

Q. And they were not out hunting Waco Hampton, were they, as far as you know?

A. I had heard Lamb——

Q. Lamb wasn't there; he was 15 miles away?

A. I had heard Mr.. Lamb and his posse say that they were going to capture him if they could.

Q. Of course they wanted Hampton and Craig, but these guards were not after them?

A. No, sir; not particularly.

Q. You heard the shooting, a regularly volley fired d'wn towards Judge Shirley's, diid you?

A. Yes, sir.

Q. 20 or 30 shots?

A. Yes, sir; between 20 and 30.

Q. After that you heard two shots fired which seemed to be muffled?

A. Yes, sir.

Q. Were you in the room?

A. We were all in the house.

Q. A cold night?

A. Yes, sir.

Q. Door closed?

A. Yes, sir.

Q. And you heard all the shots?

A. Yes, sir.

Q. How were those two muffled?

A. Muffled as if they were in the house, or box, or down beside the house.

Q. Didn't they all sound muffled to you?

A. No, sir; they all sounded as keen and clear as I ever heard a shot in my life.

Q. What was that man's name that was setting up with you there?

A. George Harlan.

Q. Is he here?

A. No, sir.

142 Q. He is the one that got up and went out doors, is he?

A. Yes, sir; he heard them out of doors.

Q. How far away was the road from the house?

A. I guess it is between 2 and 300 yards.

Q. You heard voices talking, holloing, and what?

A. Carousing and whooping, going on like drunken men; sounded like a drunken brawl passing along the road.

Q. You didn't go out to hear them even, did you?

A. No, sir.

Q. But this man George Harlan did?

A. Yes, sir.

Q. You were inside of the room?

A. Yes, sir.

Q. The door clos'd and you heard that?

A. Yes, sir.

Q. You took the two bodies up to Tahlequah and then turned them over to whom?

A. Bob French. He is a U. S. deputy marshal.

Q. What did you turn them over to the marshal for?

A. So they could take care of them.

Q. Poorboy was an Indian, was he not? He was working for Zeke Paris, was he not?

A. Yes, sir; there had to be a post mortem examination, I believe, and he was also a constable there in town of the United States court, and he took charge of the bodies to have the examination made.

Q. Did you ever see John Brown before this things happened?

A. Yes, sir.

Q. How often.

A. Twice, I think.

Q. You were not personally acquainted with him?

A. No, s'r.

Q. Just like you knew Hampton?

A. Yes, sir.

Q. You saw him frequently, didn't you?

A. He used to go to school to me; knew him well since he was a child.

Q. You are a school teacher, then, by profession?

A. Yes, sir.

143 Q. How long since Wacoo went to school to you?

A. He went to school to me about four months before old man Canan was killed. I can not tell you when that was exactly.

Q. Is that the man he was sent to the pen for killing?

A. Yes, sir.

Q. How old was Wacoo?

A. I don't remember his age.

Q. Well, about?

A. I could not tell you; he was just a child; there was three of the little boys went to school to me.

Q. He was the oldest one?

A. Yes, sir.

Q. Did you see him after he came back?

A. No, sir; I have never seen him since he came back.

Q. You are up to Vinita now?

A. I have been there since August.

Q. You were not in that part of the country much?

A. No, sir.

Q. You had not seen Waco since he came back?

A. No, sir.

Q. Did Florence Blevins live at your house?

A. I think she has been staying there all summer and winter likely.

Q. Staying with your wife?

A. Yes, sir.

Q. Did Laura Herring stay there too?

A. Her mother lives below there at John Shirley's; I don't know where she stays. Laura was there the night that Whitehead was down at my house.

Q. You saw her there?

A. No, sir; I say she was there the night that Whitehead was down there.

Q. Did you see her down there?

A. No, sir.

Q. You just h'ard she was down there?

A. Yes, sir.

Q. Do you know what those people were doing down at your house?

A. I know what John Shirley and Whitehead told me they were doing.

Q. You do not know then, if that is all you know. You do

144 not know what these women were doing down there?

The DISTRICT ATTORNEY. How could he know if he was not there?

Mr. FREDERICK (of counsel for defendant). Were they there before you left home?

A. Florence Blevins was.

Q. Staying there?

A. Been there about a week.

Q. You had her hired, didn't you?

A. No, sir; you bet I didn't.

Q. Bet what?

A. Bet all you want to I didn't have her hired at all.

Q. She was there about a week before you left home?

A. Yes, sir.

Q. Maybe that is the reason you left home?

A. That is one reason.

Q. You and Florence were not much friendly I expect?

A. I guess not.

Q. She did not run you off, did she?

A. No, sir.

Q. Didn't order you off?

A. No, sir; not much she didn't.

Q. But that is one reason you left?

A. That is one reason I left, on account of her presence there.

Q. What was the matter with Florence? You say you and her fell out; how was that?

A. No, sir; we didn't have any falling out.

Q. What about her presence?

A. She is a lewd woman, and I did not want her about my home, and my wife persisted in keeping her there.

Q. This other woman, Laura Herring; I guess there was nothing the matter with her?

A. I don't know anything about her character myself personally.

Q. Are you still teaching school?

A. No, sir; not now.

Q. What are you doing now?

A. I am a porter at a hotel at the present; have been since last August.

Q. You do not work at manual labor?

145 A. I do, certainly; I have all my life.

Q. Teaching school is not manual labor?

A. No, sir; not much; a good deal of work about it.

Q. The manual labor is in using the ferule on obstinate scholars?

A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. Where had Florence Blevins been living before she went to your house?

A. She had been living at her mother's, over across Barren Fork.

Q. You say she is a lewd woman?

A. Yes, sir.
Q. I will ask you if she is not notoriously so?
A. Yes, sir; very much so.
Q. Who brought her there?
A. My wife brought her there.
Q. And she has been living there ever since you left?
A. Yes, sir; that is my information. I have seen her there every time I have been past the house or at the house.
Q. Now, what was that talk you had with Whitehead at Tahlequah before he went down to Judge Shirley's? You told Judge Frederick you could tell him something about that if he wanted it, and he didn't ask you further; what was it?
A. I had told the deputy marshal—that is, the marshal's posse—all about the circumstance, and he had went and found Whitehead and had a talk with Whitehead, and he got Whitehead to agree to go over there and stay at the old man's—old man Shirley's—and see if he could locate this man Craig.
Q. That was his business?
A. Yes, sir.
146 Q. That was all?
A. Yes, sir; he was to go there in the capacity of a farm hand, a work hand, for old man Shirley.
Q. Old man Shirley is your wife's father?
A. Yes, sir; he was simply to locate and find out where Craig was, knowing that Craig would come around my wife's house.
Q. That was the understanding that was had between Still——
A. No, sir; this was another posse; that was a posse from Muskogee, a posse of Wilkerson by the name of Trout—is the man that sent Whitehead over to Shirley's.

147 WILLIAM SULLIVAN, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Q. When you were on the stand yesterday you said you had got word about this killing, and had been up to Judge Shirley's, and that you saw the bodies there, but you didn't get off to look at them. Please state if you saw any empty cartridge hulls there about the bodies when you went up?
A. No, sir.
Q. What time of day did you get there?
A. Just a little after sun up.
Q. Do you know whether any cartridge hulls were picked up there?
A. Yes, sir; I seen those that my stepson said he picked up there.
Q. You didn't pick them up yourself, nor did you see them picked up?
A. No, sir.
Q. Was your stepson there?
A. Yes, sir.
Q. Were the empty hulls there?
A. Yes, sir; he brought the hulls to my house.
Q. You didn't see them until he brought them to your house?
A. No, sir.
(Witness excused.)

148 SAM MANUS, being called upon the part of the Government, was sworn and examined by the district attorney, and testified as follows, to-wit:

Q. I believe you are the stepfather of Wakoo Hampton, are you not?

A. Yes, sir.

Q. You married his mother?

A. Yes, sir.

Q. Where was Wakoo Hampton living at the time that Poor Boy and Whitehead were killed?

A. Staying there partly at my house, and he would be off somewheres two or three days, and he would come to my house to stay.

Q. Your house was his home?

A. Yes, sir.

Q. His mother was there?

A. Yes, sir.

Q. When did he come back from the house of correction at Washington?

A. About the first of last October. I was down here when he come back. When I went back home he had been there three or four days.

Q. Do you know John Brown, the defendant?

A. Yes, sir.

Q. Where was he living at that time?

A. He didn't have no regular home at all. He made a stop at Isaac Johnson's last summer.

Q. Where was he staying just at the time of the killing? Was he staying at your house?

A. Yes, sir.

Q. How long had he been there at your house?

A. He had been there about three weeks, I reckon; three or four.

Q. What was he doing there?

A. I hired him in the first place to help me build a barn.

Q. Wakoo was at home at that time?

A. He came to my house that week that he first came there.

149 Q. Did he have any arms with him?

A. No, sir; he never had any.

Q. On the day of the killing of Poorboy and Whitehead where were you?

A. I was out on the farm during the day. I went over there to kill some hogs, and that evening as I went back, after I got across the Barren Fork, I was driving along and I heard some hollering behind me the way I come, and it was John Brown and Wakoo Hampton coming to my wagon.

Q. Was there anybody with you?

A. My wife was along.

Q. On your way home, after you went across Barren Fork?

A. Yes, sir.

Q. Is that before you get to the forks of the road? How far is that from the Thornton House?

A. About seventy-five or one hundred yards below.

Q. You heard them hollering and you stopped and they came up to you?

A. Yes, sir.
Q. How were they—horseback or a-foot?
A. They were both riding one horse.
Q. What horse was it?
A. It was a sorrel horse that belonged to Wakoo Hampton.
Q. Were they armed?
A. Yes, sir; they had a Winchester and three pistols.
Q. Who had the two pistols and who had the one?
A. I think Wakoo Hampton had two pistols.
Q. What did the defendant have?
A. As well as I recollect he had a Smith and Wesson pistol.
Q. Who had the gun?
A. I could not tell you.

Q. What did they want with you when they came up?

150 A. They didn't want anything hardly. Wakoo Hampton said that Ball Christy had taken a quart of whiskey from him, and he had to go down in the brush and throw down on him before he could get it away.

Q. Had they any whiskey with them?
A. I didn't see any.
Q. What time in the day was that?
A. That was about dusk.
Q. How far from your house?
A. About two miles, I suppose; I had the long mountain to go up.
Q. How far is it from old man Shirely's to your house?
A. About two miles and a half, the way the road runs.
Q. It was at the foot of the mountain you met them?
A. Yes, sir.
Q. How far was they from Annie Hitchcok's house when you met them there that night?
A. Between a quarter and half a mile, I suppose.
Q. You and your wife then went on home?
A. Yes, sir.
Q. Did they go home with you?
A. No, sir; they turned and went back the way they came.
Q. What direction did they go?
A. They went sort of—well, it is towards the direction of the ford of the creek.
Q. South?
A. Yes, sir.
Q. Go on and state what occurred after that?
A. I had been at home about half an hour, and I heard the shooting.
Q. How long did it take you to get home?
A. It took me about three quarters of an hour, or may be an hour to get home; I had to stop about every ten steps to get up that mountain, as I was pretty heavily loaded.
Q. You would stop to blow your horses?
A. Yes, sir.

Q. How long had you been at home, do you think, when you

151 heard the shooting?

A. We had been home about half an hour, maybe three quarters; when I heard the guns I was out at my wagon.

Q. After you got home what did you do before you heard these shots fired?

A. I took the wagon sheet out to the wagon to cover up the pork I had in there. I was going to carry it down the next day to market. While I was at the wagon I heard the shooting.

Q. Had you turned out your horses?

A. Yes, sir; I had done fed my horses.

Q. Had you had supper?

A. Yes, sir.

Q. Did you get that after you went home?

A. Yes, sir.

Q. Who got supper?

A. My wife.

Q. I suppose she went to getting supper as soon as she got home?

A. Yes, sir.

Q. You ate supper, and took the wagon sheet out to cover up the hogs?

A. When I was getting ready to go to bed, I thought about the pork in the wagon, and thought maybe the dogs would get at it.

Q. What kind of shooting did you hear?

A. They were shooting fast.

Q. Were there many shots, or few?

A. There was several shots; I couldn't tell you how many.

Q. Could you tell where they were?

A. Yes, sir; I thought it was about Mrs. Hitchcoks or Mr. Shirleys, or somewhere about there. And in about an hour afterwards I heard the boys. Brown and Wakoo Hampton whooped about an hour after the shooting, and they came in the house, and Wakoo said "We have killed Heck Bruner and Tom Whitehead."

Q. Those two came in the house together?

A. Yes, sir.

152 Q. Go ahead?

A. I didn't believe them. I just laid there, and they said, "look at the gun and pistol," and they had a new belt, and they said, "here is the belt also." I didn't believe them, and they said, "look at the blood on this gun."

Q. Did you see some blood on it?

A. Yes, sir.

Q. Was it the same gun that Wakoo had, or was it another?

A. No, sir; it was pretty near a new thirty-eight Winchester. It was a strange gun to me, and they had a forty-five rubber-handle pistol, Colt's I think.

Q. Was that one they took off with them?

A. No, sir; I thought I knew the pistol; I knew but two in the neighborhood just like that. One was Walter Shirley's, and the other Brown Hitchcock's, they had pistols just alike, and I thought that was one of their pistols.

Q. When they showed you the gun and the belt and blood ——

A. Wakoo Hampton said, "I shot Bruner in the bowels, and he just bent over and hollered not to shoot him any more;" and this is what John Brown said, "I killed my man the first shot." And Wakoo said, "how

much money did you get out of Whitehead's pocket," and John Brown showed three dollars, and said that was all the money the man had, and Wakoo said "Heck Bruner didn't have a cent in his pocket."

Q. Did Brown pull out the three dollars?

A. Yes, sir.

Q. About what time in the night was that?

A. That was about nine or ten o'clock.

Q. How long did they stay?

A. Just a little while; didn't stay long; they told me to get up and put up the horse, and I got up and up the horses they rode; they rode John Roach's horse back.

153 Q. How did they come to your house?

A. They come on Wacco's pony and Roach's—at least they told me it was Roach's horse they were riding.

Q. You say you put up Wacoo's pony?

A. Yes, sir.

Q. They rode off on the other pony?

A. Yes, sir.

Q. Did they take their guns with them?

A. Yes, sir.

Q. All of them?

A. Yes, sir; they had two pistols apiece then and a Winchester apiece when they left.

Q. Do you know who had the dead man's gun, the new gun, when they came to your house, whether it was Brown or Wacoo?

A. I believe it was Wacoo had the new gun.

Q. Which gun did the defendant have, or did he have a gun?

A. I think he had a pistol.

Q. Do you know which gun the defendant carried away with him when he left?

A. No, sir; I didn't pay any attention to that.

Q. Each one of them had a Winchester apiece, when they left?

A. Yes, sir.

Q. When Brown said that he killed his man the first shot did he say where he shot him?

A. Yes, sir; he said he shot him in the forehead.

Q. Which one did he say he shot?

A. Whitehead.

Q. Hampton told you that he shot his man in the belly, and he doubled up and begged?

A. Yes, sir; he looked up and begged, and he said he didn't like to shoot him again, and he said John Brown said to him to shoot him again, and he said John Brown just jumped around there and whooping, and got to shooting at the man that was begging. Both of them got to shooting at him, he said.

Q. They thought that was Bruner?

154 A. Yes, sir; that is what Wacoo said. John Brown did'nt say that himself.

Q. John was there, though?

A. Yes, sir; he was there.

Q. When Wacoo said that Brown here told him to shoot the man that was begging, and that Brown got to jumping around there and whooping, and that they both fired, did Brown say anything at all?

A. No, sir; he just said Brown told him to shoot; he said he thought Brown was a coward, but he seen that night he was brave; that he whooped and shot.

The COURT. Who said that, Wacoo or Brown?

A. Wacoo.

The DISTRICT ATTORNEY. You say that John Brown exhibited to you $3 in money that night when he came back, and said he had gotten it?

A. Yes, sir; I seen $3 in money.

Q. That he got from Whitehead?

A. Yes, sir;

Q. Do you know whether he had any money prior to that time?

A. No, sir; I don't believe he had any before that.

Q. He was working for you?

A. Yes, sir.

Q. Did you pay him any money?

A. No, sir; I gave him a suit of clothes.

Q. The suit he has got on?

A. No, sir; I don't believe it is; it may be the coat, though.

Q. You gave him a suit of clothes for the work he did?

A. Yes, sir.

Q. You didn't pay him any money?

A. No, sir.

Q. Now, you say they staid there a short time; I would like for you to state about how long they remained at your house?

A. They didn't remain there half an hour.

Q. Did they tell you where they were going?

A. No, sir; they never said where they were going. I didn't see them for three or four days then.

155 Q. Then where did you see them?

A. They came there to my house.

Q. John was at your house when he was arrested, was he not?

A. Yes, sir; he was at my house.

Q. Where did he sleep?

A. He slept in the side room, in the kitchen.

Q. Where was Wacoo that evening?

A. He left there, got on his pony and left there, went in the direction of Mrs. Hitchcock's and Mr. Bruner and his posse killed him down there by the Thornton place.

Q. Do you know where Wacoo had started to?

A. Started for Mrs. Hitchcock's.

Q. Bruner is a deputy marshal?

A. Yes, sir.

Q. Did you know that Wacoo had been killed before they arrested Brown?

A. No, sir; well, I had an idea, but I didn't say anything. I heard the guns.

Q. Did John know it—Brown?

A. He heard the guns, I think, but I don't reckon he took any hint.

Q. What time did the marshals arrest Brown?
A. It was about 10, 9 or 10 o'clock, I guess.
Q. Where were they?
A. There at my house, in the side room, at the kitchen.
Q. Where were?
A. I was in the back room there, me and my family.
Q. State if the defendant had any guns with him when he went to bed?
A. Yes, sir.
Q. What?
A. He had a Winchester.
Q. How many?
156 A. There was two there; I don't recollect whether he carried them both in, but there was two Winchesters there. Wacoo left his when he went off, and carried Brown's pistol with him, or one of the pistols that Brown carried.
Q. Did he carry two?
A. No, sir; he just carried one all the time.
Q. Carried a pistol and a Winchester?
A. Yes, sir.
Q. What did Wacoo carry?
A. Carried a pistol and a Winchester.
Q. Do you know anything about the arrest of John Brown? Did you see the marshal and his posse when they went in to arrest Brown?
A. Yes, sir; I opened the door as soon as they hollo'ed out of doors. I went to the door and opened the door, and they went and looked on my bed, the bed that was in the room, and I told them he was in the side room there.
Q. Did you go in with them?
A. No, sir; I was making a light in the room where we was.
Q. You didn't see them make the arrest?
A. No, sir; I heard the posse say "throw up your hands," to him.
Q. Did you hear him say anything else?
A. He repeated that two or three times.
Q. Do you know where Brown's gun was at the time that the posse went in there?
A. No, sir.
Q. You don't know where he kept his gun?
A. No, sir; just what the posse told me.
Q. What is the name of the posse?
A. Charley Copeland, I believe.
Q. You say that on the night of the killing they brought home with them a strange gun they said they had taken from Bruner. Where was that gun the night he was arrested?
157 A. It was in the room where he was.
Q. What became of it?
A. Bruner took it and turned it over to Waler Shirley, the owner of the gun; I was there when Waler Shirley got the gun at Mrs. Hitchcock's.
Q. The .38 gun was one of the guns that was in the room that night?
A. Yes, sir.
Q. Do you know Jim Craig?

A. Yes, sir.

Q. Was he at your house any about that time—about the time of this killing?

A. No, sir; I never saw Jim Craig only when he was riding as posse under Wilkerson, a Muskogee marshal. He used to stop there and eat dinner. That is the only time I ever saw him at my house.

Q. He wasn't at your house along about this time then?

A. No, sir.

Cross-examination by Mr. GEO. A. GRACE:

Question. How long had you been acquainted with the defendant before he came to your house?

A. I had been acquainted with him about a year and a half, I suppose.

Q. I understood you to say that he had made a crop at Isaac Johnson's that year?

A. Yes, sir; that summer.

Q. And you hired him to help build a barn?

A. Yes, sir.

Q. He came to your house for that purpose, and was there at that time?

A. Well, I could not tell you that he came there for that purpose at all.

Q. That is what you hired him for?

A. Yes, sir; I hired him after he came to my house.

158 Q. Where was he when you hired him?

A. At my house.

Q. Hadn't you seen him before that?

A. Yes, sir; I had seen him lots before that. I don't recollect if I said anything to him about hiring him before that; I don't recollect; I may have said it.

Q. Down at your wife's place—hadn't you seen him down there?

A. I seen him down there, but I don't recollect of ever saying anything to him about it then.

Q. Do you remember of saying down there you wanted to hire a hand?

A. Yes, sir.

Q. And so you hired him to help build the barn?

A. Yes, sir.

Q. He was a pretty good hand, wasn't he?

A. Yes, sir; a good hand.

Q. He come there without any arms, I believe you say?

A. He didn't have any arms when he came there.

Q. He had been at your place, around there, about three weeks?

A. Yes, sir; three weeks or more.

Q. This particular day of the killing, on the 8th, you left home in the morning to go down to your other place, did you?

A. Yes, sir.

Q. When you left home was Ball Christie there?

A. Yes, sir.

Q. Anyone else?

A. Yes, sir; there was Ball Christie, and Bill Dick, and Noll Pigeon.

Q. And Wacoo and the defendant?

A. Yes, sir.

Q. You left them there, and you and your wife went down to the other place to see about killing some hogs?

A. Yes, sir.

Q. Were they drinking when you left them?

A. Yes, sir; they were drinking a little, I think.

Q. You went down to your place and saw nothing more of them
159 until as you came on back?

A. Yes, sir.

Q. Near the ford of the creek, was it?

A. Yes, sir; on the Barren Fork, between the house and the creek.

Q. Now, at that place Wacoo rode up to you, they both rode up to you, both on the same horse?

A. Yes, sir.

Q. Which was in front?

A. Wacoo.

Q. Brown was behind?

A. Yes, sir.

Q. Wacoo told you that Ball Christie had taken a quart of whiskey from him and started off with it?

A. Yes, sir; and he said that he overtaken him down in the bottom, and he had to throw down on him two or three times before he got it back from him.

Q. I suppose that Ball Christie come on down with them. Where would he leave the road; would you have met him when he was going home, or would he have turned off before you would meet him?

A. He would have turned off a mile below there.

Q. So he had turned off and went the road?

A. No; he hadn't turned off; he was just down there in the bottom somewhere.

Q. You didn't meet him, did you?

A. No, sir; I just had Wacoo's word for it. He said he was down in the bottom.

Q. If Ball Christie had gone home, where would he have left the road going down from your house?

A. He would leave it doen by Sullivan's.

Q. How far from the Thornton house?

A. It is over a mile.

Q. How far were you from the ford of the creek when you saw Wacoo and this boy?

A. I was about 300 yards from the ford of the creek.

Q. Doesn't the road turn off at the ford of the creek to go to Ball Christie's?

A. No, sir.

160 Q. Can't you go that way?

A. There is no road turns off that way; there is just a narrow hollow what the creek runs down.

Q. How far did Ball Christie live from your place?

A. He lives eight or ten miles.

Q. When you got home was Ball Christie or any of these parties you speak of there?

A. No, sir.

Q. All gone?

A. Yes, sir; nobody there but the children.

Q. You met these parties and they seemed to have been drinking some?

A. They seemed to be drinking, but I didn't see any whiskey.

Q. Then you went on home and these parties rode on back the way they had come?

A. Yes, sir.

Q. Did they leave the road, or do you know where they went?

A. I didn't notice whether they left the road or not.

Q. Was Mrs. Hitchcock's in that direction?

A. No, sir; not exactly; it is sorter up the creek to the right.

Q. You don't know where they went?

A. No, sir.

Q. You say they had some arms then; that is, Wacoo's outfit had guns and pistols then; I will ask you if it was anything uncommon for——

A. John Brown owned a pistol himself.

Q. What kind of a one?

A. Smith and Wesson, that he bought from Johnson, the man that he farmed for.

Q. When was that?

A. It may have been the Saturday before the killing.

Q. What size pistol was that?

A. It was a 44 Smith & Wesson.

Q. I was about to ask you if it was anything unusual for Wacoo to go around with pistols and guns on?

A. No, sir.

Q. He went all the time armed, did he?

A. Yes, sir.

161 Q. I will ask you if you had not heard him often say that it was his intention to resist arrest if anybody attempted to take him?

A. Yes, sir.

Q. He went prepared for the marshals all the time?

A. Yes, sir; I have heard him say that.

Q. Is Ball Christie any relation to Wacoo?

A. Yes, sir; he is his uncle.

Q. Brother to your wife?

A. Half-brother.

Q. Is Ball a brother to Ned?

A. Half-brother.

Q. Christie is a full-blood Indian?

A. Yes, sir; he is an Indian; I don't hardly think he is a full-blood; that is, Ball. Old man Christie is his father, and old man Christie is a half-breed.

Q. What time of night was it, do you think, when you heard the shooting?

A. I think it was about 9 or 10 o'clock.

Q. Wacoo and Brown you saw come to the house, and they came in about a half or three-quarters of an hour afterwards?

A. About an hour afterwards.

Q. When they came in who gave the history of that occurrence, who told about the shooting?

A. Wacoo. I heard Wacoo talking outside of the yard before he came in.

Q. What was he talking?

A. He was talking about the killing.

Q. What was his language?

A. He said if anybody didn't like it, what he done, he would kill him. I thought he was hinting at me then.

Q. I will ask you if you were not afraid of him?

A. Yes, sir; I was afraid of him.

Q. That is the reason you didn't drive him off, was it?

162 A. I never told him to leave, but I advised that boy there and told him it would be best for him to leave, but he didn't seem to want to leave. I was afraid to drive that boy off; I thought he could take advantage of me. I didn't have no arms myself.

Q. You thought he was making that as a sort of a threat to you when he came in?

A. Yes, sir; that is what I thought.

Q. Was he talking Cherokee or English?

A. English.

Q. When he came in there and spoke about the shooting down there, what did he talk?

A. He talked both English and Cherokee.

Q. Both at the same time?

A. He would talk Cherokee sometimes so his mother could understand him.

Q. You are a Cherokee talker?

A. Yes, sir.

Q. Isn't your wife an Indian?

A. Yes, sir.

Q. She can not talk English at all, can she?

A. No, sir; she can't explain anything at all.

Q. Your wife was right there present?

A. Yes, sir.

Q. She is Wacoo's mother?

A. Yes, sir.

Q. You say he talked English some and Cherokee some?

A. Yes, sir. John there don't talk a bit Cherokee; he talks in English.

Q. With the exception of John, all who were present understood Cherokee and were Cherokees; that is, you and your wife and everybody else that was there?

A. Yes, sir; we all understood Cherokee.

Q. There was no cause for him to speak English to you or to his mother either. Is it not the truth that he talked Cherokee altogether?

A. No, sir; he talked some English. He was talking English when he rode up—hollored and whooped.

Q. He came in the house, and he was talking with Cherokees

163 and he talked Cherokee?

A. He talked English in the house, too. We all understand English.

Q. Your wife didn't understand it as well as she does Cherokee, does she?

A. Not exactly, but she can understand every word that you say to her.

Q. It was him that gave an account of this shooting, talking part English and part Cherokee, if you will have it that way—that is, Wacoo?

A. Yes, sir.

Q. He told how it was done, did he?

A. He says, "We have killed Heck Bruner and Tom Whitehead."

Q. Did he give an account of how that happened?

A. Yes, sir; he gave an account how it started. He said there was two marshals overhauled them there and asked them if they were Mathew Craig, and they told them no, and they said, "Where are you going?" and John Brown said, "I guess we are going to hell," to them, and they said, "Well, we will just cabbage on to you boys," then, and they told John Roach—I am just telling what Wacoo Brown told me—and John Brown——

Q. Just tell what Wacoo said.

A. And they told John Roach to surrender, and when he was in the position of laying down his gun they said Tom Whitehead shot him. That was the first tale they told me, and then the shooting commenced right there.

Q. Who shot next?

A. Wacoo said he shot, and shot Bruner in the bowels.

Q. Did he say what he shot with, whether gun or pistol?

A. With a pistol, double-action pistol.

Q. Did he say anything about having one in each hand and shooting two at the same time?

A. No, sir; he just said he shot a double-action 44. The other pistol he had was a 38.

164 Q. Then Wacoo claimed that the marshal party opened the fire on them first?

A. Yes, sir; that is what they claimed.

Q. Vame out and halted them, and as'ed them if they were Jim Craig——

A. Mathew Craig.

Q. Wacoo told them no, and they said, "Where are you going?" and Brown said "I guess we are going to hell?"

A. Yes, sir.

Q. And they said, "We will just cabbage on you boys?"

A. Yes, sir.

Q. And then Roach got off and gave up to them; didn't he?

A. Yes, sir.

Q. Got off his pony?

A. Yes, sir.

Q. Was going to give up to the', and Whitehead shot him?

A. Yes, sir; that is what they said.

Q. Then the firing commenced on both sides?

A. Yes, sir.

Q. Did they give a statement of how much Roach shot?

A. They said all that they were sorry for they were sorry for Roach; he did not have a thing to do with the killing.

Q. Who said that?

A. Brown and Wacoo both; they both began talking at once; they both said it because they staid there a long time afterwards.

Q. Tell one at a time; don't mix them up?

A. John Brown said that too.

Q. Just tell us one at a time now?

A. I have Wacoo say that lots of times.

Q. I am talking about what he told you there at that particular time that you told the district attorney about when he came home there after the shooting and had a talk with you. Did he say whether Roach shot or not?

165 A. No; he said he didn't shoot at all, he said that he was sorry that John Roach got shot.

Q. He had nothing to do with it?

A. Yes, sir; had nothing to do with the killing.

Q. Did he say anything else about it?

A. No, sir.

Q. Did he say anything there in that conversation about the pony running off?

A. Yes, sir; he said the pony run about 50 yards.

Q. What pony was that?

A. Wacoo's pony.

Q. Then Wacoo was off his pony?

A. He was on the ground when he was fighting.

Q. I will ask you how he got on the ground?

A. Got off his pony.

Q. I will ask you if Wacoo didn't say to you there when they said "We will cabbage on you boys," and they said "Give up your arms," and he said, "Wait a minute, my hand is cramped"?

A. Yes, sir; he said that.

Q. And then he slid off on the opposite side of his pony and commenced firing?

A. Yes, sir; he slid off. John Brown slid off after he got off; he got off before John Brown did.

Q. Whipped out his pistol and commenced firing?

A. He had his pistol out before he slid off his horse.

Q. He had it out to give it up and told them his hand was cramped and slid off on the other side and commenced firing?

A. Yes, sir.

Q. Roach was off, too, was he not?

A. Yes, sir.

Q. That is what Wacoo said?

A. I have heard them both say it.

Q. Was there anybody riding with Wacoo, from the way you understood it?

A. He said Brown was riding with him on the same pony.

166 Q. Was Brown riding behind Wacoo, or Roach behind Wacoo? Are you certain which it was?

A. Yes, sir; I am swearing just what they told me.

Q. Wacoo said he was riding behind him?

A. Yes, sir.

Q. Wacoo told you that the first shooting he done was after Whitehead fired on Roach?

A. Yes, sir.

Q. After they had told them they would cabbage on them, and had halted them, and asked them about Craig, and fired on Roach, and struck him here, then he slid off and commenced shooting his pistol?

A. Yes, sir.

Q. I suppose you didn't think of that when you were talking to the district attorney awhile ago, when you were telling what he said about how the shooting came up?

A. I think I told the district attorney that.

Q. They staid there and talked Cherokee and some English, Wacoo did, and they left in about half an hour?

A. Yes, sir; maybe not that long.

Q. Didn't say where they were going?

A. No, sir.

Q. In about 2 or 3 days came back?

A. Yes, sir.

Q. Who was said, "Look at the blood on this gun?"

A. Wacoo said there was blood on the gun; he had the gun, Winchester.

Q. That was a new 38?

A. Yes, sir.

Q. You say that Wacoo was talking Cherokee some and English some when he was telling you about this?

A. Yes, sir; he would talk Cherokee when my wife would ask him anything; talk Cherokee to her.

Q. She is an Indian?

A. Yes, sir.

The DISTRICT ATTORNEY. She is his mother?

167 The WITNESS. Yes, sir.

Mr. GRACE (of counsel for defendant). I will ask you if Wacoo didn't also claim that he shot both of these fellows, and would shoot all the marshals that would attack him?

A. No, sir; never did to me.

Q. What sort of money was that you speak of?

A. It was all dollar pieces.

Q. How many of them was there?

A. Three.

The DISTRICT ATTORNEY. Silver dollars?

A. Yes, sir.

Mr. GRACE (of counsel for defendant). Now, that talk about John Brown being a brave man; was that in English or Cherokee?

A. That was in Cherokee. He said that Brown was a braver man than he thought he was, and he said he would shoot—would jump and whoop and shoot.

Q. Do you know whether before that Brown had any money or not? You simply say you don't know of his having any; whether he had any or not you are not able to say?

A. He might have had some.

Q. He might have had some and you not know about it? He might have got some money from Ball Christie that morning?

A. He might have done that; from Ball Christie or one of them boys.

Q. Did Wacoo have any money?

A. Yes, sir; he had a little.

Q. How much money did Wacoo have?

A. A dollar or two, I think.

Q. How much whiskey did they have that morning?

A. I could not tell how much they had; they may have had two or three gallons, and maybe not that much.

Q. Didn't Wacoo have two quarts of whiskey that morning in
168 a sack that he said he intended to sell? Didn't he tell you that he intended to sell some whiskey there?

A. No, sir.

Q. You were not in the room when Brown was arrested?

A. No, sir.

Q. You heard him tell him to throw up his hands, and you suppose he throwed them up?

A. I just heard him say that, and I guess he throwed them up.

Q. They didn't break down the door, did they?

A. No, sir; I just opened the door.

Q. Was it dark or daylight?

A. It was away in the night.

Q. No light in the house?

A. No, sir; I was trying to get a light in there; I could not get a light in there quick enough; I was so scared, I thought they would get into a shooting scrape and they might hurt some of my children, some of my family, is the reason I could not get a light so quick.

Q. There was no fire in that side room that John Brown was in?

A. No, sir; no fire or light.

Q. There was no windows in that room there, was there?

A. There was blind windows and a door; I think Heck Bruner came through the door there.

Q. Did you hear Brown say anything in there?

A. No, sir; I did not.

Q. Did you know that Bruner was in the country?

A. I didn't exactly know he was in there; I knew he was coming up in that country; I was told that he was.

Q. You expected him, but you didn't know exactly when he would come?

A. No, sir; only that evening when Waler Shirley came there and said he seen men down there on Barren Fork, and I was just satisfied there was marshals in that vicinity.

169 Redirect examination by the DISTRICT ATTORNEY:

Q. I will ask you if Wacoo told you afterwards he shot Roach himself?

A. Yes, sir; I have heard him tell it different ways; one time he would tell me that he shot him, and then he would tell me that John Brown shot Roach.

Q. Sometimes he would say that he shot him, and sometimes that John Brown shot him?

A. Yes, sir; would say that he shot him accidentally.

Q. Did you ever hear Brown say who shot Roach?

A. I believe I heard him say that he shot at Whitehead himself and missed Whitehead and shot Roach; Roach was right behind Whitehead.

Q. You heard Brown say that?

A. Yes, sir.

Q. When was it that the defendant told you that he shot at Whitehead and missed him and shot Roach?

A. It was a good while after the killing.

Q. When he was telling you that time he told you that Whitehead was between him and Roach?

A. Yes, sir.

Q. You were asked by counsel upon the other side about their saying to you that these men halted them there in the road, and that they fired the first shot; you said that is what they first told you; what did they tell you afterwards?

A. They said afterwards that Whitehead was between them and Roach, and they shot at Whitehead and missed him and shot Roach.

Q. And that Whitehead didn't shoot him at all?

A. Yes, sir.

Q. But that Brown had done it?

A. Yes, sir; Wacoo claimed that he shot him, too.

170 Recross-examination by C. J. FREDERICK:

Q. Do I understand you to say that they afterwards claimed that Whitehead didn't shoot at all?

A. I never said that Whitehead didn't shoot at all.

The DISTRICT ATTORNEY. I didn't ask that. I asked him if Whitehead didn't shoot Roach at all.

Mr. FREDERICK (of counsel for defendant). They claimed all the time that Whitehead did shoot, didn't they?

A. Yes, sir; of course they did.

171 JOHN ROACH, having been duly sworn, was called upon behalf of the Government, and, being examined by the district attorney, testified as follows, viz:

Question. How far do you live from Annie Hitchcock?

A. I reckon about three-quarters of a mile.

Q. Are you a white man or an Indian?

A. I am a Cherokee.

Q. Do you know John Brown, the defendant?

A. I seen him a time or two. I am not much acquainted with him.

Q. Did you know Wacoo Hampton?

A. I wasn't much acquainted with him; I seen him a time or two.

Q. You know Annie Hitchcock, don't you?

A. Yes, sir.

Q. On the day that Poorboy and Whitehead were killed, please state if your wife was at Annie Hitchcock's?

A. Yes, sir.

Q. What time of day did she come there?

A. It was about one o'clock I guess when she started over there.

Q. In the afternoon she went there?
A. Yes, sir.
Q. What did she go over there for?
A. I don't know; I was down cutting wood when she went over there.
Q. Now, then, please state if you went over to Annie Hitchcock's?
A. Yes, sir.
Q. How come you to go?
A. The old woman come back just a little before sundown, and she said that Annie Hitchcock wanted to see me.
Q. Did she say what for?
A. No, sir; said she just wanted me to come over there.
Q. Please state if you went.
A. Yes, sir.
Q. How did you go?
A. Horseback.
172 Q. Did you have any arms with you?
A. I had a gun with me.
Q. Double-barr'led or single-barr'led?
A. Doubled-barr'led.
Q. What did she want with you?
A. After I got over there she wanted me to go up and see Jim Craig for her.
Q. Up where?
A. Up there to Cob Hill, below Waler Shirley's.
Q. At a house?
A. No, sir.
Q. Where did you expect to find him?
A. She said he would be on that old road down there close to Cob Hill.
Q. How far is that above Waler Shirley's?
A. It isn't quite half a mile of Waler Shirley's.
Q. At the foot of Cob Hill or top of it?
A. Right on top.
Q. Did you see the defendant and Wacoo?
A. Yes, sir; they went with me up there.
Q. Were they at Annie Hitchcock's when you got there, or did they come afterwards?
A. They came afterwards.
Q. How long afterwards?
A. About half an hour after I was there when they came.
Q. How did they come?
A. They were on the porch when I first saw them.
Q. How long did they remain?
A. It must have been about half an hour, I guess.
Q. Did you see them and Annie, or either of them, and Annie together any?
A. Annie took Wacoo Hampton out on the porch and was talking to him. I don't know what they were talking about; I didn't hear it.
Q. How long was that before you started that she and Wacoo had a talk?
A. It wasn't long before we started.
Q. What message was it she sent to Craig?

173 A. She wanted Craig to come down there that night.

Q. Did she tell you that before or after these other two men came?

A. They were there when she was talking to me; told me to tell Jim to come down.

Q. They were there when she told you that?

A. Yes, sir.

Q. Did she tell you in their presence?

A. No, sir.

Q. You say you left there?

A. Yes, sir.

Q. It was about dusk when your wife came home?

A. It was just a little before sundown.

Q. You then got on your horse and went over to Annie's?

A. Yes, sir; I eat supper and went over just about dusk.

Q. You then staid there about half an hour before these men came?

A. Yes, sir.

Q. Why were you waiting this half hour?

A. I was talking around to Tom Caywood; we were setting around by the fire.

Q. After these men came Annie told you what she wanted with you?

A. Yes, sir.

Q. That she wanted you to go up and tell Jim Craig to come down?

A. Yes, sir.

Q. Told you where you could find him?

A. Yes, sir.

Q. Then she took Waco out on the porch and had a talk with him?

A. Yes, sir.

Q. When you started how did you go, from Annie's?

A. We went horseback.

Q. How many horses did you have?

A. Two.

Q. There were three of you; how did you ride?

A. John Brown rode behind me.

Q. How come him to do that?

A. Wacoo told me to let him ride behind me.

174 Q. Wacoo rode by himself then?

A. Yes, sir.

Q. You had a gun?

A. Yes, sir; I had a gun.

Q. What did Wacoo have?

A. I think he had two pistols.

Q. What did Brown have?

A. He had a Winchester.

Q. You had a double-barr'led shot gun?

A. Yes, sir.

Q. Wacoo had two pistols?

A. Yes, sir.

Q. And John Brown had a Winchester?

A. Yes, sir.

Q. Whose Winchester 'as that?

A. I don't know whose it was.
Q. Did you have any whiskey to drink?
A. They had about a pint, I guess, in a quart bottle.
Q. Did you drink all that up before you left, or afterwards?
A. I believe I drank a little of it, about a dram. I wouldn't drink.
Q. Before you left?
A. I drank one dram before I left.
Q. Did they take any whiskey with them?
A. Yes, sir; they had about a pint, hardly a pint, I don't think.
Q. Where did you go?
A. We went up to Cob Hill, where we were to meet Jim Craig.
Q. Did you go the road?
A. Yes, sir; we went the big road.
Q. Right up by Judge Shirley's?
A. Yes, sir.
Q. Did you see anybody at Shirley's when you passed?
A. No, sir; there was nobody, but a horse hitched out at the gate, a horse standing at the gate.
Q. It was a strange horse, was it not?
A. Yes, sir; I thought it was a strange horse.
Q. Was there anything said about the horse as you passed by?
A. No, sir.
Q. Nothing said about its being a marshal's horse, or anything
175 of that kind?
A. No, sir.
Q. Then you went up past Waler Shirley's?
A. Yes, sir.
Q. When you got to Cob Hill did you find Craig?
A. No, sir.
Q. What did those two men go for?
A. I could not tell you.
Q. Did they tell you?
A. They said if they met Brown Hitchcock anywhere on the road they would kill him; Waco said that.
Q. It was Waco*b* said that?
A. Yes, sir; he was talking and joking to me and John.
Q. When you got to Cobb Hill and didn't find Craig, state what you did.
A. They said it was no use to wait there, we just go on back, and we came on back down the road.
Q. The same way you had gone up there?
A. Yes, sir.
Q. Started to go back again towards Annie Hitchcock's?
A. Yes, sir; and when we got out close to Waler Shirley's field Wacoo shot his pistol off right at the corner of the field.
Q. Do you know what he done that for?
A. No, sir; I don't.
Q. Was it for a signal for somebody, or why was it, or just because he wanted to shoot it?
A. I don't know; just because he wanted to shoot, I guess.
Q. Then what did you do?
A. We just went right on back.

Q. Were you still riding the same way, Brown riding on your horse?
A. Yes, sir; he was riding behind me yet.
Q. Now then, go on.
A. We went on down to Mr. Shirley's, and Wacoo stopped at the gate there and hollored for Whitehead to come out, he wanted to see him.
Q. That was at Judge Shirley's?
A. Yes, sir.
Q. Was that strange horse still there?
A. No, sir; we didn't see any horse.
Q. It was Wacoo that called Whitehead out?
A. Yes, sir.
176 Q. How many times did he call him?
A. I don't recollect how many times; he called several times.
Q. Was he off his horse or on his horse when he was calling him?
A. He was on his horse; had his pistol in his hand; I could see that he had his pistol in his hand. I tried to get John Brown to come on, that we didn't have any business there, and he would not let me go.
Q. Wacoo had his pistol in his hand and was calling Whitehead out?
A. Yes, sir.
Q. Did you hear Whitehead make any response; say anything in the house?
A. I heard somebody speak in the house, one of them, I don't know who, said, "Hold on a minute; I will be out directly."
Q. Then what occurred?
A. It was n't but half a minute until they both came out.
Q. Did they have any guns with them?
A. I did n't see any guns until they got outside the gate.
Q. They had some with them, did they?
A. Yes, sir.
Q. Who had the Winchester?
A. Poorboy had the Winchester, and Whitehead had the pistol.
Q. State what occurred after they came out?
A. They opened the gate and came out, and Wacoo started to ride off, and they told him to stop, and he just kept riding on, and I just rode right up opposite the garden fence. John Brown was behind me, and Whitehead seen us stop there and came there and asked me if I was Mathew Craig, and I told him I was n't, and he told me to get down and consider myself a prisoner, and I told him all right, and John, he got off back of me, off the horse, and walked around that side of Whitehead, and
177 I got down, and he told me to lay down my gun, and I stepped and stooped to lay my gun down, and I laid my gun down, and just as I started to raise up there was John standing to one side, and that throwed Whitehead right between me and John, and he told me to lay the gun down, and I laid my gun down, and as I raised up there was somebody fired a shot.
Q. Who was it that fired that shot?
A. I don't think that was Whitehead; I think it must have been Brown; he was standing on the other side of Whitehead.
Q. Did Whitehead fire a shot that night?
A. No, sir; he didn't; I don't think he fired ary shot.
Q. Did you see Whitehead's pistol after you captured him?

A. Yes, sir.

Q. Was there any shots fired out of it?

A. No, sir; I did not see it; I thought you asked me if I had seen it in his hand.

Q. No; after it was taken away?

A. No; I didn't see his pistol.

Q. Where were you shot?

A. I was shot here in the arm, and here is where it went in, and here is where it went out, and it went in here (in side).

Q. How far did it go in the side?

A. It didn't go through the skin here at all in the side.

Q. Did it strike the bone of your arm?

A. I think it did; the doctors probed it twice before they ever found out it was broke.

A JUROR. Which way were you facing, the boys inside, or——

A. Whitehead was standing right on this side of me and Brown over here.

The DISTRICT ATTORNEY. You stooped down to lay down your gun, and as you raised up the shot fired?

A. Yes, sir.

178 Q. With Whitehead between you and Brown?

A. Yes, sir.

Q. Where were Poorboy and Wacoo Hampton?

A. They were off in the road; I could not tell what they were doing.

Q. When you received that shot what did you do?

A. I started off from there then.

Q. Running or walking?

A. I walked off.

Q. What else occurred there, if anything?

A. I heard somebody holler, and I turned back to see who it was, and I seen John Brown run up to Whitehead and shoot him after he was laying on the ground.

Q. Shot Whitehead?

A. Yes, sir; John Brown shot Whitehead; I seen the blaze run all over him most.

Q. What was it that he said when he holloed?

A. I could not understand what he said; I don't know who it was hollored.

Q. What did he shoot him with?

A. With a Winchester.

Q. Could you tell what the others were doing, Wacoo and Poorboy?

A. No, sir; I just went off then and went to Hitchcock's.

Q. Did you see anything more of Wacoo and Brown?

A. Yes, sir; they catched up with me apeice down below there.

Q. Did you go off on foot or horseback?

A. I went off on foot.

Q. When they caught you did they have the horse?

A. No, sir; the horses were on ahead of us.

Q. They run off?

A. Yes, sir; down the road.

Q. They caught up with you; then where did you go?

A. After they catched up with me Wacoo told me that he had shot me; that he was the one that shot me.

Q. What did Brown say about it?

A. He didn't say anything. When he asked me where was my
179 gun, I told him I left it where I laid it down, and he run back and got the gun.

The COURT. Wacoo?

A. No, Brown.

The DISTRICT ATTORNEY. Wacoo told you that he shot you?

A. Yes, sir.

Q. Brown said nothing?

A. Only asked me where my gun was.

Q. You told him that you had left it up there on the ground, and he went up and got it?

A. Yes, sir.

Q. Then what did you do?

A. I just kept going on and he catched up with me.

Q. Did you get your horse?

A. I catched mine a little over 100 yards.

Q. Where did they catch the other one?

A. Right down about 100 yards from Annie Hitchcock's, between that and Shirley's.

Q. You walked then how far before you got on your horse?

A. About 150 yards I reckon.

Q. Did you bleed much?

A. Yes, sir; I bled a great deal.

Q. Was the blood trickling from you, or do you know?

A. I know it was running down my sleeve; they could have tracked me from the place plumb to Annie Hitchcock's if they had wanted to.

Q. Then you went down to Annie Hitchcock's, did you?

A. Yes, sir.

Q. How long did you remain there?

A. That was Tuesday night, and I remained until the next Saturday night.

Q. How long did Brown and Wacoo Hampton stay at Annie's that night after you got back before they left?

A. I don't know long they staid there; I was in the house; I don't think ary one of them came in the house. I don't think they did.

Q. Did they get your permission to ride your horse off?

A. No, sir.

Q. They took your horse, didn't they?

A. Yes, sir.

180 Q. Did you see Craig there that night?

A. Yes, sir; he came there in about an hour and a half after I was shot.

Q. He came there after the shooting?

A. Yes, sir.

Q. Did your wife come there that night?

A. Yes, sir.

Q. Before or after Craig did?

A. Before Craig come?

Q. How did she find out you were there?
A. I don't know how she found it out.
Q. Don't you know who told her?
A. No, sir; I don't.
Q. Do you know whether Craig left there to go over and tell her about it?
A. No, sir; I don't.
Q. How long did Craig stay there?
A. About an hour; maybe not so long, in the house; he might have been out.
A. Was Craig there when your wife got there?
A. No, sir; I don't think he had come yet.
Q. Your wife came first?
A. Yes, sir.
Q. Didn't your wife come there and didn't she go and tell Craig and then he come?
A. I don't know; she might; I could not tell you. She didn't say anything to me about it.
Q. Your wife came there?
A. Yes, sir; she came there before Craig did.
Q. You do not know how she learned that you were there shot?
A. No, sir.
Q. Did she leave before Craig came?
A. Yes, sir; I think she went off; she said she left the children by themselves and she had to go back.
Q. How long after she went off was it before Craig came?
A. It was about half an hour, or hardly that long.
Q. Now, did you hear Poorboy say anything at that time of this
181 shooting.
A. No, sir.
Q. You knew Whitehead, didn't you?
A. Yes, sir; I knew him?
Q. Did you know Poorboy?
A. No, sir.
Q. What made you folks think that Poorboy was Bruner if he did not say anything?
A. I didn't know who it was.
Q. Do you know why they got it into their heads it was Bruner?
A. No, sir.
Q. He didn't say anything?
A. No, sir; I didn't hear him if he did.
Q. When you passed up on your way up there by Judge Shirley's house, and saw that strange horse there, I will ask you if there was anything said about this being a marshal's horse?
A. No, sir; I didn't hear anything, only I seen the horse standing there.
Q. You knew that Craig was on the scout, didn't you?
A. Yes, sir.
Q. And that Wacoo Hampton was on the scout, didn't you?
A. Yes, sir.
Q. And you knew that was a strange horse?
A. Yes, sir.

Q. And yet you say you didn't hear anything said about this being a marshal's horse?

A. No, sir; I didn't.

Q. Where were you when you heard Wacoo Hampton say that if he run across Hitchcock he would kill him?

A. Between old man Shirley's and Waler Shirley's; between the two Shirley's.

Q. Between Judge Shirley's and Waler Shirley's?

A. Yes, sir.

Q. Were you expecting to find him?

A. No, sir.

Q. How come him to say it; what were you talking about?

A. I don't know how come him to say it.

Q. Did he and Brown here give you any reason why they went
182 up with you to hunt for Craig?

A. They said they wanted to go with me and get with him so they could scout, I think; I believe that is what they said. They were on the scout.

Q. Which one was it said that?

A. Wacoo.

Q. Why did the defendant go?

A. I don't know, sir; he was just following Wacoo around, I guess.

Q. Is that the only reason they gave you why they wanted to go with you to get to Craig?

A. Yes, sir; I guess it was.

Q. If you went after Craig and brought him down to Annie's, they were there, and they could get with him there as well as to go up there?

A. I don't know how they come to go.

Q. Brown rode your horse behind you?

A. Yes, sir.

Q. How did he carry his Winchester?

A. He carried it between us; sometimes have it in his hand.

Q. Did he have any pistol?

A. I didn't see any pistol; he might have had it?

Q. How many times did you see Brown shoot?

A. I seen him once certain; that is the time he shot Whitehead.

Q. When he was on the ground?

A. Yes, sir.

Q. After you were shot?

A. Yes, sir.

Q. You saw him once, certain?

A. Yes, sir; I am certain of that.

Q. You are not certain about the first shot?

A. No, sir.

Q. You are certain that Whitehead didn't fire?

A. Yes, sir; I am certain that he didn't fire; he was standing up mighty near against me.

Q. How was he holding his pistol?

A. Holding it right down that way when I stooped to lay my gun down.

183 Q. Did you see him when he fell?

A. No, sir; I didn't.

Q. Do you know the size of the pistol?
A. No, sir; I don't. I never had the gun in my hand.
Q. Did you do any shooting?
A. No, sir; I got Tom Caywood to look at my gun when I went in the house, and he said the loads were in the gun at Annie Hitchcock's.
Q. What did he say?
A. He looked and seen the caps on the gun, and he took the ramrod and run it down in it, and he said the loads were in there.
Q. The loads were in there when he examined it?
A. Yes, sir.
Q. That was at Annie Hitchcock's?
A. Yes, sir.
Q. That is Caywood, the witness here?
A. Yes, sir.
Q. That was a double-barr'l'd shotgun; the one you took?
A. Yes, sir.
Q. What did you take your gun with you for?
A. I always tote the old gun whenever I would go off.
Q. Your wife brought word to you that Annie wanted to see you?
A. Yes, sir.
Q. You went over there that night and carried the gun?
A. I always had the dogs with me and I always toted the gun; go fox-hunting.
Q. Did you have your dogs with you that night?
A. Yes, sir.
Q. John, didn't you get some word from your wife that caused you to take that gun?
A. No, sir; I didn't.
Q. I want you to tell the truth about it.
A. I am telling the truth about it; I always toted the gun any time I would go anywhere, any place in the woods there. I didn't know what she wanted with me, and I thought I would go and see what she
184 wanted with me and come back around through the woods and take a hunt.
Q. After night?
A. Yes, sir.
Q. How many dogs did you have with you?
A. Two.
Q. What were they, hounds?
A. There was one spotted dog and the other a black one.
Q. It seems you didn't shoot anyhow, but the taking of the gun, I would like to have some better explanation of it if you can give it.
A. When she sent for me I just picked up the gun and went.
Q. When you were there at her house, and she told you she wanted you to go after Craig, did she say anything about her husband to you?
A. No, sir; she never said nothing about him.
Q. Was Tom Caywood there then?
A. Yes, sir.
Q. Why couldn't you and Tom Caywood go up and tell Craig to come down there?
A. I don't know what is the reason he didn't go.

Q. He was at the house?
A. Yes, sir.
Q. He was there before you were sent for?
A. Yes, sir; I guess he was; he was there when I went there.

Here court took a recess until 1.30 p. m.

AFTERNOON SESSION, 1:30 o'clock.

Q. There is a little mountain between you and Annie Hitchcock, isn't there?
A. Yes, sir; pretty big mountain, too.
Q. Did you live up on the mountain or on the other side?
A. I lived right over across there, in the hollow over there.

185 Cross-examination by Mr. C. J. FREDERICK:

Question. Your name is John Roach?
A. Yes, sir.
Q. You are a Cherokee?
A. Yes, sir.
Q. You live near Judge Shirley's, I believe you say?
A. Yes, sir; about three-quarters of a mile, maybe a little further.
Q. About the same distance from Annie Hitchcock's?
A. Yes, sir; about that, I guess.
Q. Are you acquainted with John Brown, the defendant?
A. Well, I have seen him a time or two.
Q. You have seen him several times, have you not?
A. I don't know how many times I have seen him; I wasn't much acquainted with him.
Q. You knew Wacoo Hampton well, of course?
A. I wasn't acquainted with nary one of the boys.
Q. Were you not born and reared up there?
A. Yes, sir; I was born and raised there.
Q. Wacoo was, too?
A. I never was acquainted with him.
Q. I thought everybody in that country knew him?
A. I have heard of him; I wasn't acquainted with him.
Q. You had heard about his having been convicted and sent off a criminal?
A. Yes, sir; I heard about it.
Q. You heard of his having escaped from the prison and came back?
A. Yes, sir.
Q. You heard that the officers were hunting him?
A. Yes, sir; I believe I did. I am not real certain whether I did or not.

Q. You saw him down at Annie's that night when you got down
186 there?
A. He come after I got there.
Q. How long?
A. About an hour; maybe not quite so long.
Q. Had Annie told you what she wanted you to do before he came?
A. No, sir.
Q. Didn't tell you until after he came?

A. Yes, sir; after he came, I believe.
Q. John Brown and Wacoo came together?
A. Yes, sir; I think so. They were on the porch when I first knew they were there. I was in the house when they came.
Q. You knew them?
A. Yes, sir.
Q. They knew you?
A. Yes, sir.
Q. Passed around the bottle?
A. Yes, sir; they passed the bottle around, I think.
Q. Who passed the bottle around?
A. I don't recollect who passed the bottle.
Q. You took a drink?
A. Yes, sir; I took a drink I believe.
Q. Did Annie take you out before or after you took the drink?
A. I don't recollect; I believe it was after the bottle was passed around, I think.
Q. She took you out and talked to you, did she?
A. Yes, sir.
Q. Did she take Wacoo out and talk to him afterwards?
A. Yes, sir; she talked to him after she talked to me.
Q. Didn't you and her and Wacoo all talk together?
A. No, sir; I don't think we did.
Q. What did she talk to you about?
A. Wanted me to go up and see Jim Craig.
Q. Did you tell Waçoo you wanted him to go with you?
A. No, sir.
187 Q. Did she tell you to get him?
A. No, sir.
Q. How come him to go?
A. I guess she got him to go; she was talking to him.
Q. Who asked John Brown to go; you?
A. No, sir; I didn't.
Q. Who did?
A. Must have been Wacoo, I guess.
Q. Let's not guess. Who said, "John, don't you want to go up the creek?"
A. I don't recollect who said it.
Q. Didn't you?
A. No, sir.
Q. Didn't Waco say, "Don't you want to go up the creek a peice, John?"
A. It might have been; he went.
Q. What did you want John to go with you for; you only had two horses, a horse apiece for you and Wacoo; why did you 'ant him to go?
A. They come there riding one horse, I guess.
Q. What did you want John to go up the creek for?
A. I didn't tell John to go.
Q. But you wanted him to go, didn't you?
A. No, sir; I didn't want anybody to go with me.
Q. It seems you let him ride on your horse?

A. Wacoo wanted me to let him ride behind me.
Q. How is it now; did you want John to go?
A. I didn't want any of them to go; they went on their own hook, I guess.
Q. They would not go along with you, I guess, unless they asked you. The woman might have told them?
A. I don't know whether she told them to go with me or not.
Q. If you do not know you can not tell it.
A. She had Wacoo off talking to him is all I know.
Q. All you know about it, she wanted you to go?
A. Yes, sir; that is all I know.
188 Q. She didn't tell you she would get somebody to go with you?
A. No, sir.
Q. She told you to take your dogs and gun and hunt up Jim Craig?
A. She didn't say anything about the dogs.
Q. Did you take the gun?
A. Yes, sir.
Q. Did you take the dogs?
A. Yes, sir; the dogs followed.
Q. You took them along, too?
A. Yes, sir.
Q. How come John to ride behind you?
A. Wacoo told me to let him ride behind me.
Q. Waco was bossing the job, was he?
A. I reckon so.
Q. Bossed you, too?
A. Yes, sir; I guess he was.
Q. You, John, and the dogs?
A. I don't know whether he was bossing the dogs or not.
Q. When you started off you whistled for your dogs?
A. No, sir; the dogs followed me everywhere I went.
Q. You carried a hunter's horn, didn't you?
A. I believe I did have my horn along.
Q. What they call a hunting horn?
A. Yes, sir.
Q. Did you give it a toot or two, so as to let the dogs know you were after a fox?
A. No, sir.
Q. Were you not out fox-hunting that night?
A. No; I went over to see Annie Hitchcock; she went over for me.
Q. You went to find Jim Craig?
A. Yes, sir.
Q. Up to Cobb Hill?
A. Yes, sir.
Q. How long did you stay up at Cobb Hill?
A. I don't know exactly how long we staid there.
Q. Did you get down?
A. Yes, sir.
Q. Take a drink?
189 A. Yes, sir; I believe the boys did pass the bottle up there; I didn't drink any; I put the bottle up to my head.

Q. Are you a Cherokee?
A. Yes, sir.
Q. And don't drink liquor?
A. I drink it sometimes, and sometimes I don't.
Q. You took a drink, did you?
A. I turned the bottle to my head, didn't swallow any.
Q. You did that to please them?
A. Yes, sir.
Q. They turned the bottle to their head?
A. I don't know whether they drank any or not.
Q. Did John Brown refuse to take any drinks?
A. I don't think he did; I never noticed.
Q. He swigged her every time he got a chance, did he not?
A. I guess so.
Q. They were pretty tolerably full when they first came up to Annie's?
A. I could not tell you.
Q. I thought you said they acted like they were pretty drunk?
A. No, I didn't.
Q. What is the fact; were they or not? Were they pretty drunk when they got up there?
A. I could not tell you; I did not see them drink any.
Q. How did they act?
A. I could not tell you; I don't recollect how they did act.
Q. You didn't drink any before you went there?
A. No, sir.
Q. You didn't know you were going to get any liquor before you went, did you?
A. No, sir.
Q. Then you were sober?
A. Yes, sir; I was sober.
Q. Could you tell whether this defendant acted like he was drunk or not?
A. They didn't act like they were drunk.
190 Q. Did he act like he was sober?
A. I don't recollect how he did act now. I didn't pay much attention to him when he came in.
Q. You got down up there at Cob Hill?
A. Yes, sir.
Q. How long did you stay up there?
A. About half an hour; maybe not that long.
Q. Did you blow your horn?
A. No, sir; I don't believe I did; I don't recollect of blowing my horn; I may, but I don't recollect it.
Q. Didn't the dogs get after a fox and you blow it to get them off?
A. No, sir; I don't recollect it.
Q. Did you hollo?
A. No, sir; I don't recollect hollering any on the road.
Q. You staid about half an hour, made like you took a drink, you got back on your horse and came back the same way?
A. Yes, sir.
Q. Riding along slowly, I suppose?

A. Yes, sir.

Q. Made no noise or whooped along the road?

A. Yes, sir; Wacoo, when we got down there about 100 yards, or maybe a little further, from where we got on our horses, he shot his pistol off.

Q. That is when you started back from Cob Hill?

A. Yes, sir.

Q. Is that all you did as you went along?

A. Yes, sir.

Q. Did you hollo and whoop?

A. No, sir; I didn't whoop any.

Q. Didn't hollo?

A. No, sir.

Q. Did you talk loud?

A. No, sir; I don't think we did.

Q. As you went along down the road, didn't you whoop and talk loud?

A. No, sir; I don't recollect that we talked loud or not.

Q. You would know, wouldn't you? Didn't you all ride along the road quietly?

A. Yes, sir; we rode along quietly.

Q. How near did you go to Waler Shirley's?

191 A. I don't know exactly how far it is from the road to the house.

Q. It is 2 or 300 yards, is it not?

A. I guess it is somewhere about that.

Q. Do you remember when you passed along there?

A. Yes, sir.

Q. What kind of conduct was going on among you boys then; were you whooping and holloing, or riding along quietly?

A. No, sir; I don't think we whooped or hollered anywhere on the road; we may have talked a little louder than I thought we did.

Q. Where had you started then when you got on your horses and went back?

A. We were going back to Annie Hitchcock's.

Q. What for?

A. We could not find Jim Craig where Annie told us he would be, and we turned around and went back; I aimed to go on back home.

Q. You aimed to go back and tell her you could not find him, were you?

A. Yes, sir.

Q. You were pretty well acquainted with Jim, were you?

A. I have seen him a few times.

Q. You are pretty good friends, you and Jim?

A. I don't know.

Q. You and Annie are pretty good friends?

A. Yes, sir; I worked for Anne a great deal.

Q. Are you any kin to Annie?

A. No, sir.

Q. Any akin to Wacoo?

A. No, sir.

Q. You were riding along the road and you say Wacoo rode up to the fence and called the men out, did he?

A. Yes, sir.

Q. Who did he call?
A. Whitehead.
Q. Did he know Whitehead?
A. Yes, sir; he had seen him, I think.
Q. Is that the name that he called?
A. Yes, sir; that is what name he called.
192 Q. Where were you and John then?
A. We were riding along down the road.
Q. Riding or setting on your horses?
A. We were on our horses.
Q. I know you were on your horses, but were your horses walking along or standing?
A. Yes, sir; John told me to stop.
Q. Who did?
A. John Brown.
Q. What for?
A. I don't know.
Q. What did you stop for?
A. He told me to stop and wait for Wacoo. I told him, "No, let's go on," and he would not let me go on.
Q. Who wouldn't?
A. John Brown.
Q. Who had hold of the reins?
A. I did, but he would not let me go on.
Q. How could he help you from going on?
A. The reason I didn't go on I was afraid to; I knew he would kill me if I went on.
Q. Who would?
A. John Brown and Wacoo.
Q. Wacoo was the man you were afraid of?
A. Yes, sir.
Q. You were not afraid of John Brown?
A. I was afraid of both of them.
Q. What did you go with them up there for?
A. I could not help it.
Q. You didn't have to go up there; they didn't make you go up there?
A. I didn't know they were gwine until I got on my horse, until Wacoo said to let John ride behind me.
Q. You say that John was the fellow that made you stop there?
A. He did make me stop there as we came on back.
Q. How did he make you stop? Just say, "Stop, and wait for Wacoo?"
A. Yes, sir.
Q. That is what he said, and all he said?
A. Yes, sir.
193 Q. Why didn't you put your spurs to your horse and ride on? You had the reins.
A. He would made me stop.
Q. How far were you from Wacoo then?
A. I was about as far as across the building here.

Q. You had passed him then at the gate, had you?
A. Yes, sir.
Q. Wacoo was standing at the gate?
A. Yes, sir.
Q. Had this man Whitehead, and the other man, came out before John Brown told you to stop and let's wait for Wacoo?
A. No; they hadn't come out yet. John Brown said to turn around the horse and go back.
Q. Whenever John said to turn one way you turned, and did everything he told you?
A. He had me in a place I had to do it.
Q. You were forced into all of it?
A. Yes, sir.
Q. You say Whitehead didn't fire a shot?
A. No, sir; I don't think he did.
Q. Neither did Poorboy?
A. I don't know about him, whether he fired a shot or not; I could not tell.
Q. John Brown is the one that fired the first one?
A. I could not tell you who fired the first one; I don't think Whitehead fired any shot; he was stsna'ing there talking to me.
Q. John Brown is the one that did the shooting. That isn't the way you have been telling it before, is it? Didn't you tell that Whitehead shot you? Didn't you think that Whitehead had shot you?
A. If I did tell that kind of a tale I did it because I was in danger and I had to tell any kind of a tale until I got on the stand.
Q. Didn't Wacoo Hampton insist on the fact that he said he shot you accident'ly?
194 A. Yes, sir; after we got off apiece, after the killing.
Q. Why was that? You didn't think yourself in any danger from Wacoo in agreeing with him?
A. Yes, sir; I thought if I would agree with him that way he would never bother me.
Q. Wacoo said he done the shooting that shot you, didn't he?
A. Yes, sir; after the killing was over.
Q. Then you could very easily afford to say that Wacoo was the one that shot you if you wanted to agree with him?
A. I don't understand you.
Q. Did you ever tell Waco Hampton that Whitehead shot you?
A. I don't recollect whether I told him or not.
Q. Did you say it in his presence?
A. I don't recollect that I told him that.
Q. How did you happen to say that Whitehead shot you? How did you happen to think that he shot you?
A. I told it just to keep on the good side of the boys, to keep them from finishing me.
Q. Didn't you state here to-day that you first thought that Whitehead shot you?
A. I don't recollect if I did?
Q. That you thought that Whitehead shot you?
A. I don't think I said it.

Q. What is the fact about it? Did you think it?
A. I don't know whether I did or not.
Q. Did you think that Whitehead had shot you?
A. When?
Q. At the time.
A. I didn't know who shot me.
Q. Any time then?
A. Any time?
Q. Any time, yes, sir; you know what I mean, I reckon. Did you think that Whitehead shot you?
A. I could not say who shot me.

Q. I am not asking you what you could say. Do you think
195 that Whitehead shot you?

A. How could I think that he shot me when he was holding his pistol down when I was stooping down, had the muzzle of it right against the ground.

Q. That is the only reason you are going to give me, is it?
A. I guess it is.
Q. Will you be kind enough to tell me why you will not answer? Instead of giving me an argument why don't you answer the question? You can say whether you did or not, I don't care which.
The COURT. Go on and answer the question. Tell me whether you thought at any time whether Whitehead shot you. You can say that at any time you did think so or did not.
The WITNESS. I don't know hardly who did shoot me?
Mr. FREDERICK. I am not asking you who did, now. Why do you hesitate to answer me? You are not afraid to answer me, are you?
A. No, I am not afraid; I don't know how to answer the question.
The COURT. Let me ask him the question. Did you at any time think that Whitehead shot you?
A. Yes, sir; I don't think Whitehead shot me.
The COURT. Are you of the same mind now you have been all the time from the shooting?
A. Yes, sir.
The COURT. That you do not think he shot you?
A. Yes, sir.
Mr. FREDERICK (of counsel for defendant). You said that in answer to the court so low that I could not understand whether you said you did or not.
A. I didn't think that he shot me.
Q. You do not now nor never did think so?
A. No, sir; I did not.
Q. You do not think now nor never did think that Whitehead shot you?
A. No, sir; I don't think that he did.
Q. And if you said to anybody you did think he shot you you did it for what purpose?

196 A. To save my own self; you have got me on the stand and I will tell the truth about the thing. I can tell anything outside.

Q. You will?
A. Yes, sir.

Q. But you will tell the truth when you come on the stand?
A. Yes, sir.
Q. That is a good thing; I wish everybody would do that. What you are telling now is the truth?
A. Yes, sir; as near as I can.
Q. You say John Brown shot one shot up there?
A. Yes, sir.
Q. You didn't see him shoot but the one, did you?
A. That is all; the one I was certain that he shot.
Q. I asked you a question, and if you will listen you can not be mistaken. You did not see him shoot but one shot, did you?
The DISTRICT ATTORNEY. He answered the question. He says that is the only one that he is certain of.
Mr. FREDERICK (of counsel for defendant). Just answer his question. You didn't see John Brown shoot but one shot?
A. That is all I seen.
Q. That is all you saw?
A. Yes, sir.
Q. That was after Whitehead was shot down?
A. Yes, sir.
Q. Who shot him down?
A. I don't know, sir.
Q. You didn't do it?
A. No, sir.
Q. Brown didn't do it, did he?
A. I don't know whether he did or not. He was standing right on the other side of me?
Q. Brown didn't shoot him down, did he, because Brown shot him after he was down, didn't he?
A. Yes, sir; he shot him after he was down.
Q. You didn't shoot him?
A. No, sir.
Q. Did Poorboy?
A. I didn't see Poorboy.
197 Q. Did you see Hampton shoot Whitehead?
A. No, sir; I didn't.
Q. You didn't see him shoot at him at all?
A. No, sir.
Q. You had laid your gun down when Whitehead told you to lay your gun down?
A. Yes, sir; laid my gun down.
Q. Whitehead came out with a pistol in his hand?
A. Yes, sir.
Q. How close did he come to you?
A. Right up to me.
Q. Right up to your horse and told you to get down?
A. Yes, sir; he told me to consider myself a prisoner and get down, and I done so; I got down and laid do'n my gun.
Q. He told you to consider yourself a prisoner?
A. Yes, sir.
Q. What did he say to Brown?

A. Didn't say anything.
Q. He was right behind you?
A. He said to consider ourselves prisoners.
Q. He wasn't addressing himself only to you, but to Brown, too, was he not; he said, "Consider yourselves prisoners;" is that it?
A. Yes, sir.
Q. Then he said to get down, did he?
A. Yes, sir.
Q. Did he want you to lay the gun down before you got off the horse?
A. After I got off the horse.
Q. Who got down first?
A. Brown got down before I got down.
Q. On the same side that Whitehead was on?
A. Off on the other side, and walked around behind the horse.
Q. Which side did you get down on?
A. Right next to Whitehead.
Q. When you got down next to Whitehead Whitehead said lay down your gun, did he?
A. Yes, sir.
Q. Did he tell Brown to lay his down, too?
A. No, sir.
Q. He was talking to you then, was he?
A. Yes, sir.
Q. Did you tell him who you were?
A. Yes, sir.
Q. You told him your name was John Roach, did you?
A. Yes, sir.
198 Q. You laid your gun down?
A. Yes, sir.
Q. And he never had his pistol pointed at you at all, had he?
A. No, sir; if he did I didn't see it.
Q. You are a very meek man. When you laid your gun down and raised up in a standing posture you were shot; just after you had laid your gun down, as you raised up, you were shot?
A. Yes, sir; after I was raised up; after I laid my gun down.
Q. Did you lay your gun down flat on the ground?
A. Yes, sir; I guess it was flat on the ground; I never noticed whether it was or not.
Q. Why didn't you hand the gun to him?
A. He just told me to lay it on the ground.
Q. He was in reach of you then, was he not?
A. Yes, sir.
Q. You were going south, were you not?
A. Yes, sir.
Q. Did you get off on the side next there to the palings of the fence?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. Whitehead was on that side?
A. Yes, sir.
Q. And he was in reach of you?

A. Yes, sir.

Q. Was Whitehead as close to you as I am to the prisoner when you laid your gun down?

A. Yes, sir.

Q. He could put his hand on you, could he not?

A. Yes, sir.

Q. How far was Brown from you then?

A. He was standing right there on the other side.

Q. How close to Whitehead; as close as Mr. Grace here?

A. He might have been further; I could not tell.

Q. Your back to him?

A. No, sir; my side to him; I never noticed how far he was off.

199 Q. Did you see Brown at all?

A. Yes, sir; I seen him; he was standing over there; after he got off his horse he walked behind the horse.

Q. Your face was turned towards the palings?

A. No, sir; towards the big road.

Q. You had your back to the palings?

A. Yes, sir.

Q. Was Whitehead in front of you?

A. No, sir; standing right on my right side.

Q. Which way was Brown from you, on your right or left?

A. Right here on the right side.

Q. He was still on the right?

A. Yes, sir.

Q. Next to the palings?

A. Right up close to the palings. That throwed Whitehead right between me and Brown.

Q. How far were you from the palings?

A. I don't know exactly how far I was.

Q. Were you as close as the wall over there?

A. I never noticed.

Q. Were you that close?

A. I never noticed how close I was to the palings.

Q. You heard the report of the gun, of course; which way did it seem to come from, that struck you?

A. It came from right out towards the road.

Q. Right out from towards Brown?

A. Yes, sir; right from the way Brown was standing.

Q. That was the first shot fired?

A. Yes, sir; I guess it was. It was the first one I heard; that struck me.

Q. That is, the first shot you know of was the ball that struck you?

A. Yes, sir.

200 Q. You had heard no shooting from any source before that?

A. No, sir; that was the first shot that was fired, and I was struck.

Q. How long after you were struck until you heard other shots?

A. Just but a little bit.

Q. Wasn't it just that quick (snapping fingers)?

A. Yes, sir.

Q. Just that quick following one another?
A. Yes, sir.
Q. You fell when you were shot, didn't you?
A. I fell on my knees and got up and walked off.
Q. Did you get up?
A. Yes, sir; I got up and walked off.
Q. What was going on while you were getting up?
A. This shooting was going on.
Q. Did you walk out towards where Hampton was?
A. No, sir; I went off down the road.
Q. Hampton was in the road?
A. He was up the other way, and I went down.
Q. You got off by yourself?
A. Yes, sir.
Q. Didn't the boys carry you off?
A. No, sir.
Q. Didn't Brown and Hampton carry you off and put you up on your horse?
A. About 150 yards, maybe 200 yards, Brown catched my horse and helped me on the horse, and I rode the horse down to Anna Hitchcock's.
Q. Did you hollo when you were shot?
A. I don't recollect of holloing.
Q. A Cherokee does not generally hollo when they are hit, do they?
A. I don't know; I never saw many shot.
Q. Did you say to Brown, "I am shot"?
A. I don't recollect of say anything.
Q. Did you call to Hampton, "I am shot"?
201 A. I don't recollect of saying anything to anybody.
Q. You didn't say anything to anybody about being shot at all after they overtook you?
A. Yes, sir.
Q. Which one of them found out first you were shot?
A. I do not know which one.
Q. How did they find it out?
A. I believe I told them after I got along there that I was shot, and John asked me where was my gun, and I told him it was laying back there, and he went back up there and got it.
Q. Your gun wasn't loaded, was it?
A. Yes, sir.
Q. What with; mustard seed, or what?
A. A small shot; what we call turkey shot.
Q. These were all the shells you had, this load of turkey shot?
A. It was a cap and ball; there was no shell about it.
Q. When did you load it?
A. I don't know when I did load it.
Q. Didn't you load it that afternoon just before you left?
A. No, sir; it might have been loaded a day or two; I don't recollect.
Q. What did you carry a gun for that night?
A. I always toted the old gun with me.
Q. It was one of these old rickety guns that you have to tie the lock with a string?

A. Yes, sir.

Q. You had the lock tied on with a string?

A. Mighty nigh it.

Q. What did you want to carry such a rickety old gun as that for; you did not aim to shoot a fox with that, did you?

A. Yes, sir; turkeys and such as that.

Q. Do turkeys run around at nights?

A. A heap of times you can find them on trees in the night.

Q. I thought they went to their roost in the night; you thought
202 maybe you might find an old turkey gobbler strutting around in the woods that night?

A. No, sir.

Q. If you had found one you would have knocked him off, wouldn't you?

A. I might have missed him.

Q. You wouldn't shoot a fox?

A. Yes, I would.

Q. Is that the way you fox hunt?

A. Yes, sir.

Q. You are a fox hunter?

A. Yes, sir.

Q. The reason you told what you did you were afraid, but you are telling the truth now, that is, you think you will shield yourself; that you will get out of it all right yourself by telling it this way?

A. I don't know whether I will get out of it or not.

Q. They had you arrested once, didn't they?

A. Yes, sir.

Q. Released you?

A. Yes, sir.

The DISTRICT ATTORNEY. The grand jury failed to indict him.

Mr. FREDERICK. You never did tell how it occur'ed when you came here for a long time, did you?

A. I don't recollect.

Q. Don't you know that the district attorney tried to get you to tell it, and it was a long time before you would tell a bit? (After a pause.) There, are you are stopping up on us?

A. How is that? I didn't understand it.

Q. You have forgot it?

A. Yes, sir.

Q. Don't you know you would not tell it even to the district attorney for a long time after you were summoned down here as a witness?

A. I don't know whether to answer that or not.

Q. You don't want to tell it. If the truth is all you are telling it won't hurt anybody, and it won't hurt an innocent man, sure. Why do
203 you hesitate to tell it if it is the truth? (After a pause.) You won't answer. Do you know why Waco Hampton called Whitehead out for?

A. No, sir.

Q. Had you heard him say anything about it?

A. No, sir.

Q. Had you heard Hampton say anything about him that night in your presence?

A. No, sir.
Q. Did you know Whitehead was at Shirley's?
A. I knew he had been staying there; I didn't know whether he was there that night.
Q. Didn't you tell Wacoo he was there?
A. No, sir; I didn't.
Q. Who did?
A. He knew Whitehead was staying there.
Q. How did he find it out?
A. I guess him and Whitehead had been talking.
Q. Had he been talking about Whitehead to you?
A. No, sir.
Q. Had Brown?
A. No, sir; I never heard any of them say anything about it.
Q. Never said anything about it at Annie Hitchcock's?
A. No, sir; nothing said about it.
Q. Nothing said about it on the way over to Cob Hill?
A. No, sir.
Q. Nothing said about it on the way going back?
A. No, sir.
Q. The first you heard about Whitehead was Hampton calling him at Judge Shirley's?
A. Yes, sir.
Q. That is right, is it?
A. Yes, sir.
Q. Was there anything said about Heck Bruner, deputy marshal?
A. I don't recollect whether there was or not.
Q. You do not recollect about that?
A. No, sir.
Q. At Annie Hitchcock's, on the way to Cobb Hill, or on the way back to Judge Shirley's, was there anything said about Heck
204 Bruner?
A. No, sir.
Q. Was there anything said about Poorboy?
A. No, sir.
Q. Was there anything said about any officer?
A. No, sir.
Q. Nor was there anything said about calling anybody out there at Judge Shirley's?
A. No, sir.
Q. Then if there was any intention to call anybody out at Judge Shirley's you knew nothing about it, and hadn't heard about it at all; hadn't heard anything said about it?
A. No, sir.
Q. What were you all talking about on the way up and back?
A. I don't know; just one thing and another.
Q. Laughing and talking and going on?
A. We hardly ever laughed. We never talked much about anything as we went up.
Q. Do you ever laugh? You don't laugh much, do you?
A. I can't say anything about laughing.

Q. Didn't you laugh and talk?
A. Sometimes we laughed out pretty loud, sometimes.
Q. Whenever you would take a smile out of the bottle you would laugh out of your mouth; is that the way of it?
A. Yes, sir.
Q. Did John Brown have a Winchester?
A. Yes, sir.
Q. He didn't have any pistol, did he?
A. I didn't see none; he might have had it.
Q. You didn't feel a great big 44 rubbing up against your side when he was riding behind you?
A. No, sir.
Q. You didn't feel any sort of a pistol?
A. No, sir.
Q. You didn't see him with any pistol before you left Annie's?
A. No, sir; I don't recollect of any.
Q. You didn't see him with any on the way?
A. No, sir.
Q. Did you see him with any after you got back to Annie's after the killing?
A. I didn't see him much after I got back.
205 Q. He led you into the door, did he not?
A. I don't recollect who led me into the house.

Redirect examination by the DISTRICT ATTORNEY:

Question. You say you were afraid of this man?
A. Yes, sir.
Q. You have told the truth about this matter, have you?
A. Yes, sir; as near as I can.
Q. Wacoo was considered a very desperate character, was he not?
A. Yes, sir; that is the name he had up there in that country.
Q. Do you know where they got the whiskey?
A. No, sir; I don't.
Q. You state when you were shot Whitehead was standing between you and Brown?
A. Yes, sir.
Q. You were shot in the arm and the ball came out here?
A. Yes, sir.
(At the request of the district attorney the witness shows the jury where he was shot.)
Q. Did the ball go through the shirt?
A. No, sir; it made a little mark on my skin in my side.
A JUROR. You were in a stooping position when you were shot?
A. Yes, sir; I was just raising up.
A JUROR. You mean you were not standing up straight, but bent over a little, is what you mean by that?
A. Yes, sir.
The DISTRICT ATTORNEY. You had laid your gun down and was nearly up?
A. Yes, sir.
Q. Wacoo was not shot?

A. No, sir.
Q. Was Brown shot?
A. I don't know that either one of them was.
206 Q. Was either one of the horses shot?
A. No, sir.

The DISTRICT ATTORNEY. I have sent for Mrs. Shirley, who was present at the house when the killing occur'ed, and she will be here Monday. I have also sent for the posse to the deputy marshal, and he will be here Monday. With those exceptions I will rest the case.
Government rests.

207 The defendant, to maintain the issues on his part, introduced and examined the following-named witnesses: Dr. Hugh Hamilton, Mrs. Leve Hamilton, Annie Hitchcock, Eugenie Hamilton, John Brown (the defendant), Annie Christie, Jennie Christie, who testified as follows:

208 *Testimony offered on behalf of the defense.*

Dr. HUGH HAMILTON, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:
Question. You are a doctor, are you?
Answer. I reckon I pass as that.
Q. You practice medicine, do you?
A. Yes, sir; I practice a little medicine.
Q. Do you know this boy John Brown?
A. Yes, sir.
Q. How long have you known him?
A. Well, ever since 1878, I reckon.
Q. That would be something like 14 years?
A. Yes, sir; I reckon.
Q. How old is he?
A. Well, I don't know exactly how old he is; about 21, I reckon.
Q. You have known him ever since he was a small boy?
A. Yes, sir; he was a small boy when I got acquainted with him.
Q. Do you think he is 21?
A. I think that is as nigh as I can come to it.
A. Where did you know him?
A. I knew him in Searcy County, Arkansas.
Q. Where was he reared?
A. Down in Searcy and Buffalo.
Q. How long has he been up in the Indian country?
A. He came there the 6th of last August was 2 years ago, as well as I recollect.
Q. Do you know his general reputation as a peaceable, law-abiding boy?
209 A. He has always been considered a mighty good boy until this present——
Q. He never got into trouble?
A. No, sir.
Q. He lived with you awhile, did he not?

A. Yes, sir; he lived there and my sons, and around there in the neighborhood ever since he has been in the nation. A boy that never went in any bad company, or never played any cards, until he got in this last scrape. He is what I would term a good boy, for the nation.

Q. You know nothing about this killing do you?

A. I wasn't there at the killing; I lived about 5 miles, I reckon, from the killing.

Q. Is Frank Hamilton your son?

A Yes, sir.

Q. He is the young man who was on the stand yesterday?

A. Yes, sir; I reckon so.

Q. Frank lives with you, does he not?

A. Yes, sir.

Q. You saw Brown and Hampt'n after the killing, didn't you?

A. Yes, sir.

Q. Where?

A. They came to my house the night of the killing; came in and taken their seat around the fireplace just as the clock was striking 12:00 at night.

Q. Did they tell how it occurred?

A. Well Brown didn't say anything there.

Q. Did Hampton?

A. Yes, sir; that boy he just come in and he wanted me to get up.

Q. Who do you call the boy?

A. Hampton; I always call him the boy. I got up, and unthumblatched the door; knew they could pull it themselves, and just got on the bed when they came in. I thought it was my son and another young man, the young man and his wife were staying all night with my
210 son, and I 'lowed they had been setting up pretty late talking and had come down to get some tobacco or something to smoke; and just as I went back on the bed I seen the Hampton boy come in, the first I knew 't was them; they come to the fireplace and told me to get up, and I made the remark, "What for?" and he said he wanted me to get up and go down to John Roach's, and I think I asked him what was the matter down there, and he said he got hurt, and then he up and told me——

The DISTRICT ATTORNEY. Was the defendant Brown present?

A. Yes, sir; he told me then that they had got into a fight, I believe, and he said there was two marshals killed, and Roach got hurt, and he said it was done accidentally; and he said he hated it that he got hurt; that he was an innocent man, and he didn't want him hurt; and he said he would pay me to go down there and dress his arm; that he was shot through his right arm. I didn't know hardly; I couldn't think they would do such a thing as that. I didn't think they would on account of Brown being with them, and I just thought maybe——

Q. (By Mr. Frederick, of counsel for defendant.) Never mind what you thought; go on and tell what was said.

A. I believe I made the remark "You can't play off on me;" something of that kind. I didn't hardly believe it yet, and the boy said "No"——

Q. Which boy?

A. The Hampton boy. And he said, "No;" and he said, held up an extra Winchester gun; and he said "You know we didn't have that;" and I said, "I only know you had one." And he said, "You can go and look at the blood on the breech of it," and directly he taken another pistol, I believe, and he held it up. I don't know whether he pulled it out of the scabbard or not, but he held it up and he said, "Here is another pistol;" said that he didn't have before; and he said, "Come, look at the
211 blood on my hands." Then I began to think there was something in it, and I just remarked this way, "John, it is not possible you got into such a thing as that?" And John never opened his mouth, just set there with his head down. That other boy done the talking.

Q. Tell what he said.

A. He said "We were coming down by Mr. Shirley's;" that he had been up above there somewheres that night, and I don't remember whether I asked them where, and they came on down opposite Mr. Shirley's house and these marshals—I don't know whether they said they came out or was out, anyhow, they taken hold of their horses and told them to drop their guns, their weapons, I believe, something of that amount, and for them to get down, and that boy said—he said to me——

Q. This boy?

A. No, Wacoo; I will designate this boy by Brown. The boy said, "Hold on, my hands is cramped, and I can't drop my pistol now," and at that he went to shooting at them, and he got a little sort of powder burn——

Q. Who?

A. That boy; I believe it was on the right side of his face here.

Q. When you say that boy you mean Wacoo Hampton?

A. Yes, sir; and he got a little powder burn there. He said that fellow had a gun cocked on him, a Winchester, and told him to do this, and he begged him not to shoot, that his hand was cramped and could not let loose of the pistol right immediately, and that he sprung back to the other side of the horse and went to shooting.

Q. Tell us all he said.

A. That is all he told me about the thing.

Q. Did he tell you that anybody got killed?

A. He told me he killed two marshals, or they got killed. I am not certain whether he said that he killed them or they got killed.
212 He said there was two marshals killed.

Q. Did he tell you who they were?

A. He did not know who they were.

Q. Did he say what John Brown did in the difficulty?

A. No, sir; he never said, only what I am telling you. I made that remark to John at the start, and he never gave me any answer at all about it. The boy said then they taken hold of them, they asked them if either one of them was Mathew Craig, and they told them that they wasn't, I suppose, and the Hampton boy said they said: "Get down, we will take you in anyhow."

Q. Did you go down to see Roach?

A. Yes, sir; I went down next morning.

Q. Did Roach tell you how it occurred?

A. No, sir; I don't believe Roach did. I don't remember that he told me, or that I ever asked him. He said that he got shot just as he went to lay his gun down, and just about the time he was letting loose of it on the ground he said he got shot through the arm here.

Q. Who did he say shot him?

A. It appears to me like now he said it was an accident shot.

Q. From whom, did you understand?

A. Wacoo. That boys tells me himself that he done so.

Q. Don't confuse what Roach said with what Wacoo said.

A. Wacoo told me that he shot him.

Q. What did Roach say?

A. Roach said, just as he laid the gun down, that he got shot, and he said he never fired a shot. That is about all that he told me. I guess he was taking care of himself.

213 Cross-examination the DISTRICT ATTORNEY:

Question. Roach told you that he didn't fire any shot?

A. Yes, sir.

Q. Don't you think Wacoo was taking care of himself, too?

A. Wacoo was shooting like everything, I reckon, trying to shoot somebody. That is all that Roach told me.

Q. You saw Roach's gun, didn't you?

A. I never noticed his gun.

Q. Wacoo told you that he shot Roach?

A. Yes, sir; that boy told me that he shot Roach, and he said that Roach never fired a shot, and he shot him accidentally.

Q. That Roach never fired a shot?

A. Yes, sir.

Q. Did he tell you how he came to be going up with Roach that night?

A. No, sir; I don't believe he did.

Q. You asked him that, of course?

A. No; I never asked the boy about it. They said they were going up the road that night.

Q. What for?

A. It might be they had some whiskey; they were going up to let some fellow at it; I think they had a little whiskey along, if I am not mistaken.

Q. Did he say anything about Craig or Annie Hitchcock?

A. No, sir.

Q. Never said anything about that to you?

A. No, sir.

Q. When he said that he had killed the two marshals you turned to John here and said, "Why, John, how did you come to get into such a thing as that," and he remained silent?

A. Yes, sir; he just set with his head down, and never talked to me.

Q. He never denied having anything to do with it?

214 A. John never opened his mouth, I don't think, when I spoke to him.

Q. He had worked for you, had he not?

A. Yes, sir; he worked for me and my son together one season; staid at my house.

Q. You have sons the same age as him?

A. Frank is not quite as old as him; I have one son older than him.

Q. He would probably talk a little more freely to the boys than he would to you, wouldn't he?

A. I expect he might; I could not say; he might do that.

Q. You and your son Frank have talked some about this matter, have you not?

A. No, sir.

Q You know Frank was down here as a witness for the Government, and it would be the most natural thing on earth for you to talk to your son about it. No harm in it?

A. I know, but I don't recollect that I said anything to Frank about it.

Q. You knew that he was subpœnead down here?

A. Yes, sir.

Q. Maybe you are one of these kind of folks that do not talk to their children much?

A. Never about such as that.

Q. You think that John has a good character, do you?

A. I never knew——

Q. Don't you know that he and Wacoo went over to Flax and got the whiskey they got drunk on?

A. Yes, sir; that is what they said; they had some whiskey.

Q. They had some whiskey they got at Flax?

A. Yes, sir; I guess so.

Q. Did you get any from them?

A. No, sir.

Q. Don't you know they were going around there selling whiskey?

A. I can't say they were, for I didn't see them. They had whiskey, I know.

Q. Hadn't you heard that Wacoo Hampton and this young man here were carrying their guns around and selling whiskey?

215 A. I seen them with their guns around.

Q. Selling whiskey?

A. They said that boy had some whiskey along.

Q. Don't you know that Wacoo and him both went over to Flax and got some whiskey and brought it in there to sell, and that they carried their guns in defiance of all law and everything else?

A. I don't know that Brown was engaged in doing it.

Q. Brown was on the scout, was'nt he?

A. I don't know whether he was or not.

Q. You say that he was carrying guns with Wacoo; what was he doing that for?

A. I don't know.

Q. You said they were carrying guns?

A. He had a pistol; he went over to Isaac Johnson's where they owed him, and I believe they just let John have a pistol in lieu of his pay; I seen him with that pistol that day.

Q. Didn't you hear that this man Hampton, and this man Brown, the man that is now on trial, would buy whiskey there at the Flax still and carry it into the Indian country and sell it?

A. I told you they went out and got whiskey.

Q. Didn't you learn they were engaged in selling it through that part of the country?

A. I never saw them sell any anywhere; I expect they did that.

Q. And yet you are here swearing to this man's good character?

A. Outside of this trouble, I said.

Q. What do you mean by outside of this trouble?

A. Getting into all of this scrimmage.

Q. You mean that his character was good until he got to running with Wacoo Hampton?

216 A. Yes, sir.

Q. And after that they got to selling whiskey, did they not?

A. About the time he went up to Mr. Manus's to work out a suit of clothes that Mr. Manus let him have he got into company with this boy, and by some means or another they had got whiskey.

Q. Don't you know that he and Wacoo went up to Manus's together?

A. Yes; Brown went up there to work out a suit of clothes. I don't know whether he went with Wacoo or Sam or how. I believe he went with Samm and his wife.

Q. You do not think that is much against a man's character to have whiskey along to sell?

A. I should think it would hurt him.

Q. You have had a little experience in this, have you not?

A. Yes, sir; a little.

Q. You got forty days for that?

A. I got 40 days here, but at the same time I think I could have beat that thing if it wasn't for other things.

Q. Was there some other thing that you did not want to develop?

A. I knew just what I was doing.

Q. You were of age, of course; you plead guilty to both introducing and selling?

A. It was all blackmail.

Q. It is possible you took it in there for some patient?

A. No, sir; I didn't.

Q. You plead guilty to it?

A. Yes, sir; I want you to understand how it is.

Q. It is over with now?

A. I know it is; I knew I might get out of it, but involve some other one that was very near to me a heap deeper than what he was.

Q. You are swearing to the good character of Brown, and yet

217 it turns out that he got in with Wacoo up there and the two were running around selling whiskey before this shooting—running around with their arms?

A. I told you they went out and got the whiskey.

Q. How did you know they went out to get the whiskey?

A. I seen them as they came back.

Q. How much did they have?

A. Well, I don't know exactly; I noticed they had two jugs apeice of whiskey.

Q. When was that?

A. I am not positive what day it was, but it was a few days before this killing took place; it wasn't very long anyway.

Q. Did you get any from them?

A. No, sir.

Q. How did you know they had it?

A. They come right by my place. They come by and staid all night; one of them staid with me and the other at my son's; my son married an aunt of his.

Q. When they went up to Flax out into the State here and got four jugs of whiskey they came to your house and staid all night, and when they killed the two men they came to your house and staid all night?

A. They came there, but didn't stay but a few minutes.

Q. They staid in your stable loft, did they not?

A. I suppose they staid out at my son's stable loft; that is what my son's wife says.

Q. How far is the stable from your house?

A. It is right in the same lot.

Q. They put up their horses——

A. They were riding Mr. Roach's horse.

Q. They came on one horse, did they not?

A. I think so.

Q. That was Roach's?

A. I think so. I took the nag back the next morning.

218 Q. They come there about 12:00 o'clock at night and wakened you up and told you about this matter, and when they had got the whiskey about a week before they came to your house; they did not sleep in the loft that night?

A. No, sir; in bed.

Q. Are you any relation to either one of them?

A. No, sir.

Q. On the night of the killing did you hear the guns fire? You were too far away, were you not?

A. No, sir; I never heard it.

Q. They came into your house at 12:00 o'clock and came to the door, and you thought it was your son, and you got up and unfastened the door, and they came in, the two together?

A. Yes, sir; they came together.

Q. Did you have a light?

A. Yes, sir; the fire hadn't gone down yet.

Q. Had you seen them that evening before that?

A. No, sir.

Q. What was the first thing that Wacoo said to you when they came in there?

A. I never se'n them but once after they brought that whiskey before that night.

Q. Where was that?

A. When this boy had went up there to get his pay from Mr. Joihnson and got that pistol I am telling about.

Q. He got that pistol after he brought that whiskey in?

A. I believe it was.

Q. Do you know of their bringing whiskey in more than once?

A. No, sir; I never did. That there boy (meaning Brown) didn't, I know.

Q. When they came there in your house that night what was the first thing that Wacoo said to you?

A. Like I told you, I believe he said "Dock, get up," and then he up and told me that I told you.

Q. "Get up; I want you to go down and see Roach; he is wounded?"

A. Yes, sir.

219 Q. What else?

A. He said to get up, that they got into a fight, I think he said, and he said there was two marshals killed. I believe that is what he said.

Q. Did he tell you the names of any of them?

A. They didn't.

Q. Didn't they know Whitehead?

A. No, sir.

Q. Didn't they call Bruner's name?

A. That boy sort of thought it was Brown Hitchcock and Bruner, but they didn't know.

The COURT. Which boy?

A. Wacoo Hampton.

The DISTRICT ATTORNEY. Wacoo told you he sort of thought it was Brown Hitchcock and Bruner?

A. Yes, sir; I don't know for certain; I could not tell who he thought it was.

Q. Wasn't it Brown Hitchcock and Whitehead he thought it was?

A. No, sir; he thought maybe it was Brown and Bruner; he didn't know any better the next morning.

Q. He knew that Brown Hitchcock wasn't a marshal, did he not?

A. You see, Brown had come in that evening——

Q. Did he say that he came in?

A. That boy said that he did; that boy said they saw him come up that evening; seen him on the road that evening.

Q. Wacoo said that he seen Brown Hitchcock that evening, did he?

A. Yes, sir.

Q. Did he say where he had seen him?

A. They never said whereabouts it was.

Q. Brown Hitchcock is Annie Hitchcock's husband?

A. Yes, sir.

Q. Did he tell you that after they had seen Brown Hitchcock come in that evening that they went on to Annie Hitchcock's, and that she sent for Roach to come over there?

A. They never told me that.

220 Q. They told you they had seen Brown Hitchcock come in that evening?

A. It appears to me like the boy said he seen Brown Hitchcock come in that evening, or somebody seen him and told him that he came in; something to that amount, and another fellow with him.

Q. Another fellow with him that he thought was the marshal, Heck Bruner?

A. I could not say; he might have thought that; I could not say, only what he told me.

Q. Was it that night, midnight, after he came into your house that he told you it was possible Brown Hitchcock and Bruner that was killed and that he had seen Brown Hitchcock and another man come in there?

A. That was the only time he ever talked to me about it. He never liked me very much since I was here as a witness against him and his father.

Q. He liked you well enough to come and wake you up at midnight and tell you about the scene of blood he had passed through?

A. Yes, sir; he came in and told me that; he could do that without liking me very much.

Q. How did he get it into his head that it was Brown Hitchcock that was killed?

A. I could not tell you how that was.

Q. He didn't claim that at the time of the shooting the man came out and told him he was Hitchcock?

A. No, sir.

Q. Never claimed that to you?

A. No, sir.

Q. Did he claim that either one of these marshals spoke to him in the road and told him he was Bruner, claim to be Bruner?

A. No, sir; it appears to me like he seen them, or that they was going up and he was told about it, one or the two.

221 Q. He came in and said that they killed two marshals and you said you didn't believe it; you told them you could not believe it and he said, "Yes, here's an extra gun" that they had, and then showed you a pistol. Did he show you the belt?

A. Yes, sir.

Q. An extra belt?

A. Yes, sir.

Q. He showed you the belt; did he tell you which one they took it from?

A. No; I don't remember now which he said he got it from. I believe he said that Poorboy had a gun.

Q. Poorboy? I thought you said it was Brown Hitchcock and Bruner?

A. That was after he found out who they were.

Q. That night?

A. He never told me that night which one he got the gun from.

Q. You said a moment ago you never had a talk with him except that night?

A. The next morning he found out who it was.

Q. You said a moment ago that he never had any talk with you except that midnight talk?

A. He didn't, about the fight.

Q. And then you said further that at the time he thought it was Brown Hitchcock?

A. The next morning he found out different.

Q. Then he did have another talk?

A. No, sir; he was talking to another person.

Q. Who was he talking to then?

A. This Jim Craig came in the next morning about sunup; it may have been a little after sunup; might have been about half an hour before sunup; something between sunup and half an hour by sun, and this Wacoo asked him if he had found out who they were for certain.

Q. What did Craig say?

A. I wasn't with them where they were talking.

Q. You heard them talking?

A. I heard Craig say then it was Poorboy and Tom Whitehead.

222 Q. Go ahead; I want all that conversation, too.

A. That is about all of it.

Q. That night he told you they had killed the marshals, and showed you the blood on the guns and the blood upon the pistol and the blood upon his hands, and then you turned to Brown and said, "Look here! Is it possible you are in that?"

A. Something like that. I said: "It is not possible you are into the like of that?"

Q. He hung his head and remained speechless?

A. He never said anything.

Q. Then Waco told you he was sorry for Roach because he was shot accidentally?

A. Yes, sir. That is what the boy told me.

Q. And that Roach had never fired a shot?

A. Yes, sir; that is what he said.

Q. That he met these men upon the road. Did he say anything about calling them out?

A. No, sir; never said anything about calling them out; he said they came out and taken their horses by the bridle. That is the way he told it. Whether it be that way or not I don't know. Asked them if either of them was Mathew Craig, and they said no, and then they said they would arrest them anyhow, and to hold up their hands, and Wacco told them his hand was cramped, he could not let go of his pistol, and he just jumped off his horse and commenced firing.

Q. That is what he said?

A. Yes, sir.

Q. Then his party did the first shooting according to his statement to you?

A. Yes, sir; I reckon he did get the first shot in.

Q. Who did he say that he shot at?

A. The one that had the Winchester.

Q. Then Brown shot at them, did he?

A. He never said anything about that.

223 Q. He don't seem to have told you much about it except that he got in the first shot himself. Did you say he was powder burned?

A. The boy's face was powder burned along here; he said, if I am not mistaken, he could not tell the difference between the t'o fires, but he made another.

Q. Did you see that his face was powder burned?

A. I seen his eye was red, and his face on the side it was it looked like—it appears to me, if I am not mistaken, it was burned along the side here, a little reddened his eye; it was red a week.

Q. Do you pronounce it a powder burn on your oath?
A. I will tell you the truth as far as I know.
Q. On your oath do you say there was any powder burn on the man?
A. I don't know that I noticed any grains planted in his face.
Q. You know what powder burn is?
A. I think I do; yes, sir.
Q. I want you on your oath to say.
A. His eye was a sort of little red, and he said that was what done it; that is all I can tell you about it; I don't know what done it myself.
Q. How long after this was it before you saw Hampton again?
A. I don't know positive. Sometimes the boy would be there passing down to his grandma's and Brown, when I myself would not be at home.
Q. I am not asking you that.
A. I think I seen him myself as much as two or three times.
Q. I didn't ask you how often. How long after this killing was it before you saw him again? Was it ten days?
A. I could not hardly tell exactly.
Q. Was it ten days or two weeks?
A. I could not say; I might have seen him in ten days, and it might have been over ten, but it was not so very long afterwards.
224 Q. Do you say it was ten days?
A. I could not say.
Q. What is your best judgment?
A. It wasn't so very long afterwards; it might have been two weeks—well, eight or ten days, I will say that; somewheres along there.
Q. If you didn't see him for eight or ten days, how do you know his eye was red for a week afterwards?
A. That was when he came back, let it be eight or ten; it was a week or so afterwards that I say that his eye was red.
Q. Was it powder burned?
A. I can't say now; it was reddened. He says that is what done it.
Q. What is your opinion as a physician and surgeon?
A. I didn't see any powder planted in his flesh.
Q. Did you ever get drunk?
A. No, sir; I never was to say tight in my life.
Q. You have seen other people after they got over a spree have a red eye?
A. Yes, sir; I have seen several drunk people.
Q. You saw no sign of powder burn except a red place; is that all?
A. That is all I noticed; that his eyes was red like I told you.
Q. Why is it that Waco didn't like you very much—if he didn't like you very much, why is it that you and the defendant, who had been living with you, didn't go and have a private talk about the matter?
A. That morning I went right off and left them there, and when I came back from Roach's the boys were gone.
Q. You say Jim Craig came there about breakfast time, did he not?
A. About sun up or an hour by sun.
Q. What was his business?
A. He was going off somewhere.
Q. Why should all these fellows come to your house?
225 A. This fellow came by there, and whether he knew these boys were there or not, I don't know.

Q. Did he state any business?
A. He never did to me.
Q. Did these men tell you that they had slept in the stable loft that night?
A. They went off up to my sons——
Q. Did they tell you that?
A. No, sir.
Q. Did you ask them?
A. No, sir; I just 'lowed that they would go up to my sons. I got up and unbolted the door again with the thumblatch.
Q. Was it the next morning or that night that he told you that he thought it was Brown, Hitchcock, and Bruner that he killed?
A. That night.
Q. They spoke of them as being marshals to you?
A. Yes, sir; that is the way the boy first told it.
Q. What time did you go down to Roach's?
A. I can't say hardly what time; it was I reckon about two hours by sun, the next morning I started down there.
Q. Did you dress his wound?
A. Yes, sir; I went there and dressed his wound.
Q. Was his arm broken?
A. Yes, sir; I think it was.
Q. Don't you know?
A. Well, it was swelled pretty bad; he could work his finger a little, it was swelled very bad, and I never handled it much; I thought the bone was broken, and I just washed it off and bandaged it up right well, and he was resting tolerable easy.
Q. Another doctor came there and set it, did he not?
A. No, sir.
Q. I guess you do not profess to have a diploma or to be a regular graduate?
A. I am not a regular graduate.
226 Q. You do not profess to be a graduate either in medicine or surgery?
A. No; not in surgery. I practice medicine right smart.
Q. You do not have any diploma?
A. I have got a certificate from the State of Arkansas.
Q. Do you know the names of the different parts of the body—the anatomy of the human body?
A. Well, somewhat.
Q. What is the sternum? That is the place you sit on, is it not?
A. I do not profess to be an anatomist.
Q. You practice more with herbs and that kind of medicine?
A. No, sir.
Q. You use physics?
A. Yes, sir.
Q. Where was Annie when you went down to her house? What was she doing?
A. She was at home.
Q. What was she doing?

A. Well, I believe that she had a gun looking at it, if I am not mistaken—no; not that morning. It was not that morning when I first went down.

Q. When was that you saw her with the gun?

A. The same morning I left my coat; and I went back the second time, and, if I am not mistaken, the Tahlequah sheriff was there and 4 or 5 men, and I think she was looking at some of their Winchesters.

Q. You say Roach never said anything to you about it, except he said he didn't shoot?

A. He said he never fired a shot.

Q. Was Florence Blevens there? You know her, do you not?

A. I didn't know her then. I never seen her but twice until I came here. I reckon she was there that morning. I don't know her, though.

227 Redirect examination by Mr. C. J. FREDERICK:

Question. Is Leve Hamilton your wife?

A. Yes, sir.

Q. Is Monroe here?

A. No, sir.

Here court adjourned until Monday morning, March 21st, 1892.

228 MONDAY MORNING (9:00 O'CLOCK), *March 21st*, 1892.

Mrs. LEVE HAMILTON, having been duly sworn, was called upon behalf of the defense and, being examined by Mr. C. J. Frederick, testified as follows, to wit:

Question. What is your name?

Answer. Leve Hamilton.

Q. You are the wife of Doctor Hamilton, who has been on the stand?

A. Yes, sir.

Q. Do you know this defendant, John Brown?

A. Yes, sir.

Q. How long have you known him?

A. Ever since he was about 4 or 5 years old.

Q. Where did you first know him?

A. Searcey County, Arkansas.

Q. How long did you know him there?

A. About three or four years; I guess until he came to the Territory.

Q. When did he come to the Territory?

A. Three years the 6th day of next August since he came there with my eldest son.

Q. Has he been up there ever since?

A. Yes, sir. He worked the first year with my son, Monroe Hamilton, and last year with Mr. Johnson.

Q. How old is he?

A. I can't tell you his age.

Q. How old would you suppose?

A. I would suppose about 19. I don't know. I did never find out his age. I never asked him. I would take him to be about 19, for I have raised three boys to be grown myself.

Q. You live in the Indian Territory?
A. Yes, sir.
Q. Do you know his general reputation for being a peaceable, law-abiding boy?
A. Yes, sir.
229 Q. How was it?
A. He was as good or as quiet a boy as I ever knew in my life.
Q. What did he follow?
A. Farming.
Q. Did he farm or work as a farm laborer?
A. He just 'abored on the farm.
Q. Did you know this boy Wacoo Hampt'n?
A. I have known him 6 years this April; I lived in a mile of his father's place.
Q. How near did you live to Judge Shirley's, where this killing was?
A. I have never been there; they call it 14 miles.
Q. Did you see this defendant and Hampton after that?
A. Yes, sir.
Q. Where did you see them?
A. They came to my house.
Q. How long after the killing was it that they came to your house?
A. They came there the same night, about 12:00, I reckon, in the night.
Q. Did you hear this defendant and Hampton make any statement about it?
A. Yes, sir.
Q. Both of them?
A. Hamptonm was the one I heard talk about it.
Q. What statement did Hampton make about it?
A. He said he had killed two men down there in Judge Shirley's lane; two marshals, he said; one was Whitehead, he knew, and he didn't know the other; he said it was either Heck Bruner or Brown Hitchcock; he didn't know which. That was Poorboy, you know; he didn't know him.
Q. Did he tell you how they happened to kill them?
A. He said they were going along the lane, and he said they were in the fence corner——
Q. Who in the fence corner?
230 A. These men who were killed, and he said they came out into the lane and took—asked them where they was going, and Hampton said he told them to hell he reckoned, and he asked them if Mathew Craig was in the crowd, and he told them no; and he said he stepped up and took his horse by the bridle, and he said he guessed he would cabbage on them; and he told him to throw down his pistol, and he told him to hold on, his hand was cramped, and he said he jumped off on the opposite side of his horse and shot Poorboy, and just as he shot Poorboy Whitehead shot at him, and he said he fell to his knees, and when he finished up Poorboy he finished up Whitehead.
Q. Did he say anything about anybody else shooting?
A. No, sir; never said anything about anybody else shooting but him.
Q. Did he say whether Brown was along with him or not?
A. He said Brown was right there along; he said Brown was riding behind Roach, as well as I recollect.

Q. Did John Brown tell you anything about it?

A. He never spoke but two words at my house; he said when they warmed, "Let's go up to Monroe Hamilton's." There was company at Monroe's and my house, too, and he said, "We will go up and get some quilts and lay in the stable loft." That is all John Brown said.

Q. Hampton said he first shot Whitehead, was it, or who?

A. Poorboy; just as he shot him, Whitehead shot at him, and then he said he shot Whitehead until he fell to his knees; killed Poorboy and then finished up Whitehead. His eye was powder burned along here; Whitehead, he said, shot at him; it was red for a week or more—that is, Hampton's eye; he had a pistol and a gun and belt that he said he got from them.

Q. What did he do with them?

A. I reckon he kept them.

Q. Did you see him do anything with them?

231 A. Next morning, at my house, he gave John Brown the belt.

Q. How came him to give it to John?

A. He just told him to put it on, and John told him that he didn't want it, and he told him to put it on, and he put it on, and he said he didn't want to wear it, and he said for him to put it on, and John put it on. I got up and went to the fire and there was blood on the Winchester, and he showed me the pistol, and he said it was Waler Shirley's Winchester and Brown Hitchcock's pistol. He said Mrs. Hitchcock said it was.

Q. He had been to Mrs. Hitchcock's before that?

A. Yes, sir; before he came to my house he was at Mrs. Hitchcock's.

Cross-examination by the DISTRICT ATTORNEY:

Question. You said the defendant only said two words; what were they?

A. He said, "Let's go up to Monroe's and get some quilts and lay in the stable loft." That is all he said.

Q. That is a little more than two words?

A. He just said, "Let's go up to Monroe's."

Q. Monroe is your son?

A. Yes, sir.

Q. Was that said in the presence of your husband?

A. Yes, sir; my husband was right there.

Q. He heard it?

A. Yes, sir; he was laying in the bed; I would not say for certain he heard it; I reckon he could have heard it if he was listening.

Q. It was Brown that suggested that they go over to Monroe's and get the quilts——

A. We were crowded and——

232 Q. You do not understand me. It was Brown that said, "Let's go over to Monroe's and get some quilts and sleep in the loft," was it?

A. Yes, sir; Hampton repeated it, too; John Brown didn't say but two words.

Q. You mean that he didn't speak but one sentence. That is more than two words.

A. That is not much more than two words, I reckon; it would be two or three, I reckon.

Q. Let's see. "Let's go to Monroe's and get some quilts and sleep in the loft. That is 13 words; but we will not quarrel about that?"

A. That is the way we talk at home, you know.

Q. When you say two words you mean just a sentence?

A. Yes, sir; that is the way we talk at home.

Q. That is all he said, is it?

A. Yes, sir.

Q. Did you hear your husband say to him, "Why, John, you certainly didn't get into a scrape of this kind," or something to that amount?

A. I don't recollect of hearing him say it.

Q. Did you hear your husband, when Waco was telling this thing, say to Brown, "Why, John, you didn't get into that," and did you see him hang his head and refuse to answer?

A. I never recollect hearing it.

Q. They came to your house about 12:00 o'clock?

A. Yes, sir.

Q. Had you seen them that day before that?

A. No, sir.

Q. When did you last see them before that?

A. I guess it had been about 4 or 5 or 6 days.

Q. That is the day that they came with the whiskey that you saw them last?

A. They never came there in the day with the whiskey.

Q. Never came to your house with any whiskey?

A. Not in the daytime.

Q. You are splitting hairs again with me?

A. They came there away in the night; I could not tell you day
233 for night.

Q. It was at night?

A. Yes, sir.

Q. How much whiskey did they have?

A. I never seen any, only John had a little in a bottle.

Q. They had been over to Flax, had they not?

A. I reckon they had; I couldn't tell you.

Q. How long had John and Wacoo been bringing whiskey into that country?

A. That is the first I had seen of any since Wacoo came back there.

Q. How long had it been since he came back?

A. I reckon he came back in October; I would not be certain; the last of October or first of November.

Q. This shooting was on the 8th of December?

A. Yes, sir.

Q. About a week before that they came there to your house with some whiskey, John Brown and Wacoo?

A. Waco had the whiskey; he took it on up to my son Monroe's; he staid up there; John Brown staid at my house.

Q. Wacoo had the whiskey?

A. John had a little in a bottle.

Q. How do you know that Wacoo had the whiskey?

A. I saw him tote it off.

Q. You said you didn't see them have any whiskey, only a little that John Brown had in a bottle?

A. My son Monroe said he had whiskey in the sack he carried up there.

Q. Don't you know they had three jugs apiece, six gallons?

A. I never seen it.

Q. Don't you know that?

A. I don't know it un'ess I would see it; I didn't see it.

Q. You tell what Monroe said about Wacoo packing it up to his house.

A. I can't tell only what my son told me.

234 Q. Did he say that John and Wacoo each had three gallons?

A. No, sir.

Q. Who did you learn that from?

A. I didn't learn that John had three gallons; I said I didn't see him with only a little in a bottle.

Q. Do you know where they got the whiskey?

A. No, sir; I didn't go with them.

Q. Did you learn?

A. I don't recollect where they went, whether to Flax or where.

Q. How far is Flax from your house?

A. I don't know for certain; I have never been there.

Q. You mention Flax's name; what makes you mention his name?

A. If you had lived in that country as long as I have and heard his name mentioned, I guess you would know it.

Q. That is the last time before that that you saw them there.

A. Yes, sir; they came there, and John staid all night at my house, and they went off next morning.

Q. John didn't live at your house then?

A. No, sir.

Q. When did he go over to live with Wacoo?

A. I reckon he went over there maybe a week or two before that; I would not be certain.

Q. Wasn't it three weeks before that?

A. I could not tell you how long.

Q. Don't you know from that time they were engaged in bringing whiskey into that country, principally, and selling it?

A. No, sir; I don't.

Q. What kind of arms did John Brown have when they went after that whiskey?

A. I never seen him have any.

Q. Do you know whether he had or not?

A. I didn't see any.

235 Q. You didn't see them any more until they came to your house at midnight?

A. No, sir.

Q. Were you in bed asleep?

A. Yes, sir.

Q. How did they awaken you?

A. I didn't know they were there until Mr. Hamilton had got up and let them in the house, and then I wakened up.

Q. Your husband wakened first?

A. Yes, sir; they were in the house when I wakened.
Q. Did you strike a light?
A. We always kept a fire pretty much all night in the fireplace.
Q. That is all the light you had, was it?
A. Yes, sir; we did not have any lamp lit when they came in.
Q. I suppose Wacoo had all the guns, did he not?
A. He had all the guns I seen.
Q. All the guns and all the pistols?
A. I never seen John Brown have any pistol.
Q. Wacoo had two pistols?
A. Yes, sir.
Q. And two guns, did he not?
A. There was two guns.
Q. Did Wacoo have them?
A. I didn't see them come in, you know.
Q. Who carried them away when they went out?
A. John Brown toted one Winchester out is all I seen.
Q. Wacoo toted a Winchester out?
A. Yes, sir; Wacoo had two pistols; that is all the pistols.
Q. Who had the other pistol; there was three pistols?
A. I never seen nary other one. I can't tell it unless I seen it.
Q. If John had a pistol he had it so you could not see it?
A. If he had one he had it where I didn't see it.
Q. Did you see him with a gun?
A. He toted a Winchester out.
236 Q. What was the first thing that Wacoo said?
A. The first thing he said, he said he killed two men down there by Judge Shirley's, in the lane.
Q. Two marshals, did he not?
A. He said he guessed they were marshals. He said he didn't know aryone but Tom Whitehead; he knew him.
Q. He didn't say that he thought it was Hitchcock and Bruner, did he?
A. No; he said he thought that Poorboy was either Hitchcock or Bruner.
Q. Did he use that language?
A. Yes, sir.
Q. Did he say, "I think that Poorboy was either Hitchcock or Bruner?"
A. Yes, sir.
Q. That is his exact language?
A. Yes, sir.
Q. Suppose you were asked, and you talk to me just as if you were Wacoo, and say what he said.
A. "I have killed two men down there at Judge Shirley's, in the lane." He didn't say they were marshals.
Q. I think they are marshals?
A. Yes, sir; he said he thought they were marshals.
Q. I think one of them was Whitehead?
A. Yes, sir; he said he knew Whitehead.
Q. I think Poorboy was either Bruner or Brown Hitchcock; that is what he said?

A. Yes, sir; that is what he said; just the way that he said it.

Q. You do not mean that.

A. When I get on this stand I don't want to tell anything but what is straight.

Q. What did he say about Roach?

A. He said, "John Roach got shot through the arm."

Q. Who did he say shot him?

A. He never told me who shot him.

237 Q. He didn't say that he shot him?

A. No, sir.

Q. Did you hear the same conversation that your husband did?

A. I didn't hear Wacoo say that night that he shot him; I heard him say afterwards that he shot him. I am just telling what he said there that night.

Q. Did he not want your husband that night to go down and see Roach?

A. Yes, sir.

Q. Did he not say that he was sorry for Roach; that Roach never fired a shot?

A. I never heard him say that.

Q. You never did hear the defendant, John Brown, say anything about it?

A. I never did hear him say that he done any shooting at all.

Q. You never heard him say anything about it, did you?

A. No, sir.

Q. Just set in there with his head hung down, and didn't say a word that night?

A. No, sir; he just set there, and never said only what I have told you.

Q. Did he say to you that he never done any shooting?

A. I never did hear John say that he done any shooting.

Q. Did he tell you that he did not?

A. That night?

Q. Yes, ma'm.

A. No; he never said only what I have told you.

Q. Didn't say whether he had or not?

A. No, sir.

Q. Where was the Winchester when they were talking to you?

A. Setting there in the corner by the fire.

Q. Did Wacoo tell you that they had seen Brown Hitchcock come in that evening?

A. No, sir.

Q. And that some one was with him?

A. No, sir.

Q. Did Craig come there?

238 A. He come there the next morning up to my son's and eat his breakfast—they said he did; I didn't see him eat it.

Q. Frank Hamilton is your son?

A. Yes, sir; I reckon.

Q. Was Frank out with these boys?

A. No, sir.

Q. No you know that he had a talk with them the next morning?

A. No, sir; I don't know that. You see, I always attend to my affairs at the house.

Q. You didn't go out to the stable and hear the conversation that took place between them and Frank?

A. No, sir; I did not.

Q. Frank is a boy near their age, is he not?

A. Yes, sir.

Q. How old is Frank?

A. He is about 18, I guess.

Q. This defendant is 2 or 3 years older than Frank, is he not?

A. I don't think he is older than a year.

Q. He is a man that has a mustache, and your son hasn't the sign of a mustache yet.

A. He has, if he didn't shave. You take a good look at him and you would see that he had a mustache if he didn't shave.

He hasn't got any more mustache than you have. If I was a girl I would just as leave have you rub your mustache against me as him.

A. I have got a son 23 years old that has not got as much mustache as Frank has.

Q. Don't you know this boy is at l'ast 2 or 3 years older than Frank?

A. No, sir.

Q. How old was Frank when you knew this boy there in Searcey County?

A. He was pretty much his size.

Q. Don't you know that Brown and Monroe run together, your oldest son?

A. No, sir. Monroe don't ever recollect seeing John Brown since he was a little kid until he came to the Territory.

239 Q. How long have you been in the Territory?

A. 6 years.

Q. He has been there three years?

A. Yes, sir; 6th day of next August will be three years.

Q. Three years while you were in the nation you do not know anything about him in Searcey?

A. Yes, sir; he was quite little when we left there.

Q. When you left Searcy County he was a little bit of a fellow?

A. Not so powerful little; just good size.

Q. About 15 or 16 years of age?

A. I don't think he was that old. When I came to the Territory 6 years ago I don't reckon my Frank was much older than that; he was very small.

Q. How small was this boy—how much bigger?

A. I hadn't seen John for a year or t'o when I came out here.

Q. How long before you came out here since you had seen him?

A. I guess may be two years.

Q. That would be eight years ago the last time you saw him there.

A. Yes, sir.

Q. At that time about how old was he?

A. Just a small boy.

Q. Then you do not know anything about his character since then, only since he has been in the Indian country?

A. No, sir; I have seen people that came from there.

Q. If he was no older than you say he had no character when he lived there, because he was a boy; little kids do not have characters.

A. I don't know; some does, and *dome* don't.

Q. It seems that this boy has got a character now, him and Wacoo both. When he came into the Indian country how long did he live there with you?

A. He came there in August and staid with me until spring,
240 and then he hired to my son and raised a crop with him.

Q. When did he get that pistol from Johnson?

A. He got that pistol while he was working at Sam Manus's.

Q. After he went off with Wacoo?

A. He went to Sam Manus's to work out a suit of clothes.

Q. But he went there with Wacoo?

A. He passed the house with Waco that day he went up there and bought the pistol.

Q. Wacoo was with him that day, was he?

A. Yes, sir.

Q. He and Wacoo were together the day that he got the pistol?

A. Yes, sir; they passed my house, and Wacoo's said he was going over to his grandma's; I don't know whether he went with John or where he went.

Q. They passed by together?

A. Yes, sir.

Q. Riding the same horse?

A. No, sir; they were riding different horses.

Q. How long was that before they brought the whiskey in?

A. I could not tell you exactly how long.

Q. Was it three or four days before?

A. Oh, it was longer than that; I could not tell you exactly how long.

Q. Was it a week or two weeks?

A. I could not tell you; it might have been a week, and it might have been eight or ten days; I don't keep the time that everybody passes the road.

Q. That is, before they got the whiskey. The whiskey was got some four or five days before the killing, was it not?

A. I guess so; I don't know how long; I could not say.

Q. Did you hear them say anything about Hitchcock having been seen in the neighborhood that evening?

A. No, sir; I did not.

Q. Then if your husband heard that, it was some time when you were not listening?

241 A. Yes, sir; if he heard it he heard it when I didn't hear it; I didn't hear it.

Q. These men slept in your son's loft did they?

A. Yes, sir; in a stable loft.

Q. What time did Craig come over there?

A. I guess he must have come there about sunup; I don't know; he was up to my son's and he came down to my house.

Q. What was his business there?

A. He said he came after the doctor to go dress John Roach's arm.

Q. The doctor had gone long before that?

A. No, sir; he had not gone yet.

Q. Then he came from Annie Hitchcock's, did he?

A. That is what he said; I don't know where he came from; I could not tell you. He was at my house; that is as far as I can tell you.

Q. He didn't want to get the doctor to go and look after the men who were shot at Shirley's, did he?

A. No; he didn't say anything about that.

Q. Did Wacoo have the doctor go there and look after Roach?

A. Yes, sir.

Q. He didn't ask him to go and look after the other men?

A. No, sir; he wanted him to go that night; he said he had money to pay him if he would go and dress Roach's arm, and Hamilton told him that he would not go that night. He said he wasn't out going around of night in that country. Somebody might shoot him.

Q. Craig you say came there in the morning about breakfast time?

A. Yes, sir; about sunup, or maybe a quarter or half an hour by sun.

Q. His business was to get the doctor to go there and look after Roach?

A. Yes, sir.

242 Q. Did he tell him that he had seen Roach?

A. Yes, sir.

Q. He must have gotton there pretty early in the morning?

A. It was early in the morning.

Q. Before breakfast?

A. I had dun eat.

Q. Did he not get to your son's before breakfast?

A. I think they were just about ready to eat when he got there. My son's wife is here; she can tell you.

Q. What is her name?

A. Jennie Hamilton. We live 30 or 40 yards apart.

Q. When the defendant was at your house where was he sleeping?

A. He never staid there but this one piece of the night and one night.

Q. Where did he sleep then?

A. Up stairs.

Q. Why didn't he sleep up stairs this night that he came there at midnight?

A. I don't know why.

Q. It wasn't because you didn't have any room for him?

A. Yes, sir, we had cotton pickers there.

Q. Did they ask for a place to sleep?

A. Wacoo did.

Q. What did you tell him?

A. I told him I didn't have any beds; I had a lot there picking cotton, and I told him to go up to Monroe's, and they might get a bed to sleep on up there.

Q. Did you know how many horses they had?

A. No, sir; I didn't see any horses only John Roach's the next morning, that I recollect of.

Q. They rode off on that horse the next morning?

A. No, sir; Doctor Hamilton rode that horse back to Roach's, I think.
Q. How did they leave?
A. On foot.
Q. Do you know where they went?
A. No, sir; I think they went over to Mrs. Canan's.
Q. Kernard's?
A. Yes, sir; they call them Canan; she is Wacoo's grandmother. That is where he said he was going; I can't tell you only what he said.
Q. Where does she live?
A. About two miles of me, I reckon.

243 ANNIE HITCHCOCK, having been duly sworn, was called upon behalf of the defendant, and being examined by Mr. George A. Grace, testified as follows, to wit:

Question. Where do you live?
Answer. 10 miles east of Tahlequah.
Q. Are you acquainted with Mr. Brown, the defendant in this case?
A. Yes, sir.
Q. How far is it from your house to Judge Shirley's?
A. We always call it a quarter.
Q. Judge Shirley is your father?
A. Yes, sir.
Q. Are you acquainted with John Roach?
A. Yes, sir.
Q. I understand that Whitehead and Poorboy were killed at Judge Shirley's on the 8th day of last December; on the 8th, in the daytime, was John Roach's wife at your house?
A. Yes, sir.
Q. I will ask you if you sent for John Roach to come over there?
A. I did.
Q. What for?
A. I sent for him to come over there to kill some hogs for me.
Q. Who was at your house at that time? Was there any gentlemen staying at your place at that time?
A. Tom Caywood was there.
Q. What did Tom come there for?
A. He had been staying there for some time.
Q. Had he been working for you?
A. Yes, sir.
Q. Did you settle up with him?
A. No, sir.
Q. Why were you going to kill hogs?
A. I was owing Tom Caywood $7.50, and I wanted to kill the hogs to sell them to pay him.

244 Q. Did Mr. Roach come?
A. Yes, he come that night.

Q. That is what you wanted of him in particular, wanted him to kill hogs?
A. Yes, sir.
Q. Did you kill the hogs?
A. No, sir.

Q. Why?
A. Because he got shot.
Q. After he got shot he wasn't able to kill them?
A. No, sir.
Q. Did you hear the shooting from your place?
A. Yes, sir.
Q. How did it sound?
A. I could not tell you much about how it sounded; it sounded like a whole lot of shots all together.
Q. After the shooting did these parties come to your house; that is, Brown, Wacoo, and Roach?
A. Yes, sir.
Q. I will ask you if Mr. Roach gave any account of the shooting, how it came up, after he got back?
A. Yes, sir; he said a little about it. When he came in John called to me; I wasn't in the house when they brought him in and John 'ent to him and said, "We got into some trouble and Roach got shot, and I want you to take care of him," and I went on in and went to caring for Roach and dressed his arm. While I was taking care of Roach, Brown here and Wacoo was talking to Tom Caywood; I don't know what he said to Caywood or nothing about it.
Q. What did Roach say?
A. I asked him who shot him, and he said Tom Whitehead shot him. When he said that Wacoo just spoke up and said "No, I shot him accidentally."
Q. State what Roach said about the way the shooting came up, the way they came across these fellows, the way they met, and the way they happened to mee', if he did so.
A. He never had much to say about it anyway that night. He was sick when he came in and he had but little to say.
245 Q. Did Roach say there that night——
The DISTRICT ATTORNEY. This is your witness.
Mr. GRACE (of counsel for defendant). Of course it is. (To the witness.) I will ask you now whether Roach made any statement in regard to the way they met these marshals there that night or the next night?
A. I heard Roach say something about it, but to just start out and tell what he said I could not do it, for I heard a right smart said around there, and I would not undertake to make a statement, for I could not.
Q. You don't remember just what Roach did say in regard to it?
A. No, sir.
Q. Do you remember whether he said that they called the marshals out?
The DISTRICT ATTORNEY. That is leading.
The COURT. I would not lead the witness, Mr. Grace. Just let her state what she knows without leading her.
Mr. GRACE (of counsel for defendant). Her memory on that point does not seem to be very good; I do not have any desire to lead her, but I want to direct her attention to that particular point.
The COURT. Ask her if he said anything in regard to that. The question is clearly leading.

Mr. GRACE (of counsel for defendant). Do you remember whether he made any statement——

A. No, sir; I do not.

Q. Do you remember whether he said the marshals halted them or they halted the marshals?

A. He said something about that, but I do not now remember what he said or nothing about it. I would not undertake to tell it, because I don't know.

246 Q. You do not know what he said on that point?

A. No, sir; I don't.

Q. Do you know who was with Roach over there, whether Roach rode on one horse alone or with somebody?

A. Roach said that him and John Brown was riding together on the same horse. That is what he told me.

Q. Did he say whether they were riding in front or behind him?

A. I don't know; I could not say.

Q. Did he tell whether or not he shot?

A. No, sir; he didn't say anything about whether he did or not. He didn't have but little to say about it to me.

Q. Did he say whether or not he was there at the shooting?

A. Yes, sir; I guess he was there.

Q. Did he say?

A. Yes, sir; he said he was there.

Q. He told you that he was shot?

A. Yes, sir.

Q. Did he say where he was when he got shot?

A. He said right there in front of the yard at my father's.

Q. Do you know where Wacoo, Brown, and Roach were going when they left?

A. Yes, sir; they told me they were going to see my brother.

Q. Who was your brother?

A. Waler Shirley.

Q. I will ask you if you knew or had any idea there was going to be any shooting up there, or anybody shot?

A. No, sir; I didn't know anything about it.

Q. How long had you been acquainted with Brown?

A. I have seen Brown off and on for two years, but I never was very much acquainted with him.

Q. You were summoned here by the Government, were you not?

A. Yes, sir.

247 Cross-examination by the DISTRICT ATTORNEY:

Question. I believe you and your husband were not living together at that time?

A. No, sir.

Q. How long had you been separated?

A. Ever since 18th day of last June.

Q. Craig was arrested at your house, was he not?

A. Yes, sir.

Q. What was he doing at your house?

A. He was just stopping there; he wasn't doing anything particularly.

Q. Just stoppin' at your house?

A. Yes, sir.
Q. How long had he been stopping there?
A. He hadn't been there but a day or two.
Q. What time in the day was he arrested the first time?
A. Early in the morning.
Q. He was arrested the second time at your house?
A. Yes, sir; twice there.
Q. After he was arrested the first time he left, did he not?
A. Yes, sir; he left the country a little while; he said he left the country, went to Paul's Valley.
Q. He rode your horse?
A. He rode a horse I sold to him on condition.
Q. I will ask you if you got a letter from him?
A. Not while he was gone, I didn't.
Q. I will ask you if you got a letter in regard to that horse in which he expressed his love for you, and told you that he would claim that he had bought the horse from you?
A. No, sir.
Q. I will ask you if there is not such a letter as that, in his handwriting, on file in your husband's divorce suit?
248 A. I do not know anything about that; I never seen the letter.
Q. Don't you know there was a letter found there in his handwriting?
Mr. GRACE (of counsel for defendant). I object to that unless you produce the letter.
The WITNESS. I don't know anything about it.
The DISTRICT ATTORNEY. You didn't receive the letter?
A. No, sir; I didn't.
Q. He was at your house when he was arrested the second time?
A. Yes, sir; he was.
Q. He seems to have been there a great deal?
A. He has been.
Q. Is he any relation of yours?
A. None at all.
Q. Your husband was living at Vinita at that time, was he not?
A. I guess he was; I don't know where he was.
Q. He came into the neighborhood that night of the killing, did he not?
A. He said he come there; I didn't see him until the next day.
Q. You heard of his being in that country, didn't you?
A. No, sir; I did not. He left there on Tuesday morning, going to Tahlequah, him and Sut Still; I didn't know that he came back or anything about it.
Q. You sent for Roach to come to your house Tuesday?
A. Yes, sir.
Q. To kill hogs?
A. Yes, sir.
Q. How long did Caywood stay there after that?
A. I don't know how long; he staid there several days.
Q. Did you kill the hogs while Caywood was there?
A. No, sir.
Q. Why didn't you?

A. Because Roach got shot and we could not kill them.

249 Q. You could get somebody else to kill them?

A. I didn't try to.

Q. Caywood could kill the hogs?

A. I know he could, but I didn't ask him.

Q. Why not?

A. I don't know why not; just because I didn't want to. I wasn't ready to have the hogs killed.

If you were ready to have the hogs killed the night of the shooting why wasn't you ready to have them killed the next day?

A. I don't know why, but I didn't try to get Caywood to kill the hogs.

Q. When these men got killed then you were not ready to kill your hogs; there had been enough blood shed, perhaps?

A. Maybe there had; I don't know anything about it.

Q. What time did Mr. Roach come to your house?

A. He come to my house about dusk, I guess.

Q. Did you tell him you wanted him to go up and get Craig at Cob Hill?

A. No, sir; I didn't.

Q. How long was it after he got there was it that these men came?

A. It was about half or quarter of an hour, I guess.

Q. Did Roach have a gun?

A. Yes, sir.

Q. Did he have the dogs with him?

A. Yes, sir.

Q. He had the dogs, I suppose, to catch the hogs?

A. No, sir; I had the hogs in the pen.

Q. He had a couple of dogs, did he not?

A. I don't know how many he had; there was dogs following him; I don't know how many there was.

Q. Wacoo and the defendant came there pretty often to your house?

250 A. I don't know what their business was; that was the second time that Wacoo Hampton had ever been at my house.

Q. Was he ever there afterwards?

A. Yes, sir; several times.

Q. What was he doing there?

A. Just passing backward and forward, and stopped there as he came from towards Mr. Hamilton's.

Q. How long did they remain there that night?

A. They didn't remain there more than half an hour.

Q. Then they all three went off together?

A. Yes, sir.

Q. How did they ride when they left?

A. I don't know; I just noticed them going, but I don't know how they rode.

Q. Had you gone to bed before the shooting?

A. No, sir.

Q. Who was at your house when the shooting occurred?

A. Tom Caywood, Bud Wolf, Neola Pidgeon, Ball Christie, and Florence Blevins.

Q. What became of these men before these men came back there, Ball Christie and these others?

A. They were still there when they came back.

Q. Was Ball Christie there when they came back?

A. Yes, sir.

Q. He is a brother of Ned Christie?

A. I guess so; I don't know.

Q. Was he armed?

A. I believe he had a Winchester.

Q. Who were the others?

A. Neola Pidgeon was one.

Q. He was on the scout, was he not?

A. I don't know anything at all about him.

Q. What has become of Pidgeon?

A. I don't know.

Q. Don't you know that he had killed a deputy marshal?

A. I don't know a thing about it. That was the first time I had ever seen the man.

Q. Was Pidgeon armed?

A. I don't remember; I can not say, for I don't remember; I don't
251 know; I remember Ball Christie having a Winchester, and about Pidgeon I would not say, because I don't know.

Q. Were these men all there to see Florence?

A. I di'n't know who they were there to see.

Q. They didn't all court Florence, did they?

A. I guess not; I could not tell you about that; I don't know; they have never been there since, and never were there before.

Q. What would all these men congregate at your house on the night of the killing for?

A. Christie and Pidgeon was following Brown and Wacoo Hampton.

Q. Did they leave with them when they left that night?

A. No, sir; they got drunk and staid there.

Q. Staid all night?

A. No, sir; one staid until nearly day, and the other left that night.

Q. Did you put them to bed drunk?

A. No, sir; I didn't have anything to do with them; they laid around on the floor.

Q. They were there, were they, when these men left, or afterwards?

A. They were there when they left, and when they came back.

Q. They didn't follow them away?

A. They didn't follow them any further than my house, because they got drunk there.

Q. That is Pidgeon and Christie? Did Wolf follow them up to your house, too?

A. No, sir; Wolf was staying all night there, and he staid there.

Q. Was Christie on the scout?

A. I have been told since he was; I don't know a thing about him.

Q. There was Christie, who was on the scout; he is a brother of Ned Christie, who was standing off the marshals; and there was Pidgeon, who was charged with murder, was he not?

A. I don't know a thing about that.
252 Q. There was Wacoo on the scout?
A. Yes, sir; I know he was.

Q. They followed these men up to your house and staid there. Did you folks learn there was some marshals in that country looking for these men that night?

A. No, sir; I didn't know anything about them, only this man Whitehead stopping at pa's; I didn't know he was a marshal, or anything about him.

Q. For some reason these men, who were all on the scout, rallied at your house that night?

A. Yes, sir; they all came there that night.

Q. Had it ever occurred before?

A. No, sir.

Q. That wouldn't have been a safe place for the marshal to pop in there at that time, would it?

A. I don't expect it would.

Q. Who brought the whiskey there?

A. Waco Hampton had the whiskey that I seen.

Q. He and John Brown came together, did they not?

A. Yes, sir.

Q. If I understand you, you sent for Roach, and he came first, and after that Wacoo Hampton and the defendant came?

A. Yes, sir.

Q. Were they armed?

A. Yes, sir.

Q. What did Wacoo have?

A. I believe Wacoo had a pistol.

Q. Did he not have two pistols?

A. I believe he had.

Q. John had a gun, did he not?

A. Yes, sir; John had a Winchester.

Q. It was Wacoo's Winchester, was it not?

A. I don't know whose it was; all I know he had one.

Q. You sent for Roach, and he came with a double-barrelled shotgun; Wacoo and the defendant came a short time afterwards with the Winchester and two pistols; then, after them, Bald Christie and Neola Pidgeon came?

A. Yes, sir.

Q. And they were armed, were they not?
253 A. Bald was armed; I could not say about Neola Pidgeon.
Q. Was Wolf armed?

A. No, sir.

Q. Was Tom Caywood?

A. No, sir.

Q. They were there accidentally?

A. Tom Caywood was staying there, and Wolf just come down there on a visit.

Q. Was Tom Caywood staying there at that time?

A. Yes, sir.

Q. Had he not been gone awhile and come back?

A. Yes, sir.
Q. Wolf was there?
A. Yes, sir; staid all night.
Q. I suppose he came down to see the girls?
A. I don't know what he came for.
Q. Came down for a little fun?
A. I could not tell you about that.
Q. The boys had a great deal of fun at your house, didn't they?
A. I don't know whether they had any fun or not; I do not propose to tell anything only what I know?
Q. There are some things that women oughtn't to be compelled to tell anyhow?
A. I do not pretend to tell everything I know, and still tell the truth ab'ut what I do tell.
Q. How long had Wacoo and the defendants been at your house before Baid Christie and Pidgeon came?
A. Hadn't been there but a few minutes; hadn't got in the house yet when these other parties walked up?
Q. All came pretty much together?
A. Yes, sir; all mighty nigh together.
Q. How long did they remain, did you say, before Wacoo, Roach, and the defendant left?
A. They didn't stay more than half an hour. Just a short time.
Q. They left leaving Christie and Pidgeon at your house?
254 A. Yes, sir.
Q. How long were they gone before they came back?
A. Wasn't gone more than an hour or an hour and a half, I don't guess.
Q. How long after the shooting was it before they came in?
A. About a quarter of an hour.
Q. You say after they came back after the shooting Brown knocked at the door?
A. No, sir; he was in the house and I was out of doors, and he called to me—Brown came in the house as I was outdoors and he called to me.
Q. What did you go outdoors for?
A. A person does not have to tell what they step out for every time.
Q. You just stepped out?
A. Yes, sir.
Q. Where were you?
A. I was out of doors.
Q. Whereabouts?
A. I was out there between the house and the chicken house.
Q. Was there anybody with you?
A. No, sir.
Q. Christie wasn't out there?
A. He was out there somewhere, but he wasn't with me.
Q. Now, Annie——
A. I am telling you what I know about it. What good does it do to make me tell something I don't know.
Q. I know all about Christie, and you, too?
A. If you know more about Christie than I do, of course you have it to tell.

Q. And Christie was out there behind the house, too?
A. I don't know where he was.
Q. Where was Pidgeon?
A. In the house.
Q. You and Christie were outside when they came home?
A. Yes, sir; when they came in the house.
Q. How long had you been outside?
255 A. I hadn't been out there but a few minutes.
Q. Where were you when the shooting happened?
A. I was in the house.
Q. You went out then?
A. Yes, sir; I got up and walked out.
Q. You and Christie both?
A. No, sir; I went out first and Christie came out after I did.
Q. Right after the shooting?
A. No, sir.
Q. You do not know anything about the shooting?
A. No, sir.
Q. When these folks came back from that murder you were both outside?
A. Yes, sir.
Q. Brown went in the house first?
A. I don't know who went in the house first. I wasn't in there when they came in. He called me from the inside.
Q. Brown did?
A. Yes, sir.
Q. How long after the shooting was it before you went out?
A. I reckon it was about 5 or 10 minutes.
Q. You were outside when they came and Brown called you in?
A. Yes, sir.
Q. What did he say?
A. He just said we got into some trouble up here awhile ago and Roach got shot, and I want you to take care of him. That is just what he said.
Q. Then you and Christie went in?
A. I went in; Christie did not go in.
Q. What became of Christie?
A. I don't know what became of him.
Q. It was Brown called to you and told you that Roach got hurt and he wanted you to take care of him?
A. Yes, sir.
Q. Did you see Roach hand his gun to Caywood and tell him that he hadn't shot and ask him to examine the gun?
A. Yes, sir.
256 Q. He handed the gun to Caywood and asked him to see if it was loaded?
A. Yes, sir.
Q. Did Caywood do so?
A. Yes, sir.
Q. And it was not loaded?
A. Yes, sir; it was loaded.
Q. Then he claimed not to have shot?

A. He said he didn't shoot any.
Q. He was pretty bad scared, was he not?
A. He seemed to be that night.
Q. When they brought him in did he bleed much?
A. Yes, sir; a great deal.
Q. Did you send anybody for a doctor for him?
A. No, sir; I didn't send for no doctor at all.
Q. Did you see Craig that night?
A. Yes, sir; he came to my house that night.
Q. What time?
A. About 11:00 o'clock.
Q. How long did he stay?
A. He staid until about 5:00 o'clock in the morning, I reckon.
Q. What was he doing there?
A. Mrs. Roach came there, and as she went on back home she met him, so she tells me, and told him that John was shot, and he came on over there.
Q. He staid there until about 5:00?
A. Yes, sir.
Q. Where d'd he sleep?
A. He didn't sleep at all; was setting up there talking to John.
Q. Didn't go to bed?
A. No, sir; wasn't any of us went to bed.
Q. You all set up?
A. Yes, sir.
Q. Craig was on the scout, too?
A. Yes, sir.
Q. Did he have any gun?
A. He had a pistol.
257 Q. Will you tell me how it is that all these fellows that were on the scout, standing off the marshals, happened to meet at your house that night?
A. I could not tell you that; I do not know how it happened.
Q. You didn't send for them, of course?
A. What would I be sending for them for?
Q. I don't know, unless you wanted to get rid of old Hitchcock.
A. I didn't want to get rid of him; I have got nothing to do with him.
Q. You drove him away.
A. I don't know why they came there; it just happened that way that night.
Q. It happened that these desperadoes assembled at your house that night, and it happened that two men that were taken to be marshals were killed. Did Craig have more than one pistol?
A. That is all I seen him have.
Q. Where did he go when he left your house?
A. I don't know where he went to.
Q. When did you next see him?
A. I saw him there the next day after Waco Hampton was buried; I don't know what day of the month it was.
Q. He left there, did he?

A. Yes, sir.
Q. It got too hot for him?
A. I don't know whether it got too hot for him or not.
Q. He could not stay away and he came back?
A. He came back; I don't know what brought him back.
Q. There must have been something very attractive back there?
A. There may have been; I don't know.
Q. Wasn't it Annie Hitchcock?
A. I don't know.
258 Q. You don't?
A. You know more about it than I do.
Q. I think I don't know any more; I think I know as much. He came back to see you, did he not?
A. Do you reckon you are going to get me to say he did?
Q. Poor old Hitchcock, he had gone off; you got rid of him?
A. He went off himself; I didn't tell him to go off.
Q. He wouldn't want to stay there when a fellow like Craig took his place all the time?
A. They will make some of you believe that; that is all right, though. Every fellow has a right to believe his part of everything.
Q. A good looking girl, and this old fellow Hitchcock——
A. We are not talking on that subject to-day; we are trying John Brown. We will talk about that some other day. (Laughter.)
Q. I am perfectly willing to take your time to talk about it. What was Florence doing at your house?
A. She had been staying at my house for two or three months.
Q. How did she make a living?
A. She made it by staying there; I hired her, I guess.
Q. Did you pay her?
A. Yes, sir; I paid her wages for staying there?
Q. Is that the only way she had of making a living?
A. If she had another way I don't know it; you will have to ask her about that.
Q. She came to your house and Mr. Hitchcock left, did he not?
A. Yes, sir; she was there before he left.
Q. You didn't bring her there in order that he might keep company with her while you were cutting around with Craig?
A. Of course not.
259 Q. She hadn't been there but a few days when Mr. Hitchcock left. How long had you and Mr. Hitchcock been married?
A. Eleven years the 12th of September.
Q. How many children did you have?
A. Three.
Q. By him?
A. Yes, sir.
Q. How old are they?
A. One is 9 years old, one 7, and one 5.
Q. Boys or girls?
A. They are boys.
Q. All boys?
A. Yes, sir.

Q. Nice little children, are they not? (No response.) You kind of hesitated when I asked you whether they were Hitchcock's?

A. Of course they are his.

Q. These men came back to your house, you say, about 11:00 o'clock. What time did they come back to your house after the shooting?

A. The clock struck 8:00 as they came in. I don't know whether it was 8:00 o'clock or not, but the clock struck 8:00.

Q. Why are you not willing to say it was eight o'clock?

A. I don't know whether the clock was right or not.

Q. Did you change it?

A. No, sir; I didn't.

Q. Do you know why, after they did this killing, they came to your house?

A. No, sir.

Q. Did they tell you why?

A. No, sir.

Q. Gave you no reason?

A. No, sir. They just brought Roach in there, and said they wanted me to take care of him.

Q. They left your house to go to the killing, and they came back to your house after the killing?

A. Yes, sir; they came back there afterwards.

Q. How long did they remain there after the killing?

260 A. They didn't stay but a little while; they didn't set down at all.

Q. Was Christie drinking at that time?

A. Christie was drunk, lying down in the corner, and I believe he was asleep.

Q. I thought you said he was outside of the house?

A. I will take that back. It was Pigeon that was drunk.

Q. You ought to know which one was outside with you?

A. Christie is the one; it was Pigeon that was in the corner.

Q. You ought to be able to remember that event?

A. I guess I will remember it.

Q. Christie wasn't drunk?

A. Yes, sir; they were all drunk.

Q. When the others left, Christie and Pigeon remained?

A. Yes, sir; they stayed there.

Q. When the sun rose in the morning, were any of those men who were on the scout there?

A. No, sir.

Q. They came there before dark, and left before daylight?

A. Yes, sir.

Q. All of them?

A. Yes, sir; all of them left.

Q. Wasn't any of them there at daylight except Caywood and Roach?

A. Yes, sir; and Wolf.

Q. They were not on the scout?

A. No, sir.

Q. Pigeon, Christie, Hampton, and Craig were on the scout?

A. Yes, sir.

Q. Pigeon and Christie were not so drunk but that they had sense enough to leave before daylight?

A. I guess they sobered up in that time.

Q. You say that when Roach said that Whitehead shot him, Hampton spoke up and said that he shot him accidentally?

A. Yes, sir.

261 A. What did Brown say?

A. He didn't say anything; he just stood there; he never said anything at all to me.

Q. He never denied that he had anything to do with it, or confessed it, or anything else?

A. No, sir; never said anything about it.

Q. When you told Mr. Grace Roach didn't say anything about whether he shot or not, you was mistaken. You now say that he didn't shoot, and that he handed his gun to Caywood for Caywood to examine it?

A. Yes, sir.

Q. You were mistaken when you told that to Mr. Grace?

A. Yes, sir.

Q. Did Roach's wife come to your h'use again that night?

A. Yes, sir; she came there after the shooting was over awhile.

Q. What was she over there for?

A. She told me that one of her children was sick, and she came over to see if I had any medicine.

Q. She seemed to be coming over to your house a great deal?

A. She is there off and on all the time.

Q. She had a mountain to cross?

A. Yes, sir.

Q. She came over there in the afternoon, and took back word to Roach you wanted him, and then, after the shooting, she came back again, after night?

A. Yes, sir.

Q. Was there anybody with her?

A. She had a little girl with her.

Q. Did anybody inform her that her husband was wounded before she came to your house?

A. No, sir; she heard the shooting, and she didn't know what it meant, and she came there to see if John was at my house, and to get some medicine for her little boy, she told me.

262 Q. Did anybody else come to your house after the shooting?

A. No one but Craig.

Q. Did they tell you who it was they shot?

A. They said it was Tom Whitehead and Heck Bruener.

Q. They cal'ed them marshals, did they?

A. Yes, sir.

Q. Didn't tell you they didn't know whether it was Heck Bruner or Brown Hitchcock they had shot?

A. No, sir; they just said it was Tom Whitehead and Bruner. If they were talking about it being Hitchcock they talked it somewhere else, not at my house.

Q. They never mentioned Hitchcock's name, did they?

A. No, sir.

Q. Nor you to them?
A. No, sir.
Q. When did you say it was that Craig came back again?
A. The next day after Wacoo Hampton was buried; I don't know what day of the month it was.
Q. How long was he at your house, then, before he was arrested?
A. He wasn't there but a little while. He left there and went up across the line somewhere; I don't know where he went.
Q. He came back there to your house, did he?
A. He came back there just a day or so before he was arrested this last time.
Q. Did he stay there two days?
A. He staid there a day and night until the next evening, and he was arrested that evening.
Q. How long did he stay there when he came back there a day or two after Wacoo Hampton was shot?
A. Didn't stay there but one night, and left the next day.
Q. Staid one night?
A. Yes, sir.
Q. And then went off?
A. He left; I don't know where he went to.
263 Q. Did he tell you where he was going?
A. No, sir.
Q. Then he came back again how long after that?
A. I don't know how long after that; just a day or so before he was arrested this last time.
Q. Staid how many days and nights?
A. Staid a day and night, and till the n't night, when he was arrested just after dark a little while.
Q. He seemed to be around you a great deal?
A. He has been there a great deal.
Q. Did he bri*ght* the horse back?
A. No, sir; he brought a horse back, but didn't bring mine back.
Q. Where is the horse that he brought back?
A. It is up at Tahlequah at the livery stable. He told me when he was brought down here to get that horse and keep it until I got mine.
Q. I thought you sold it to him?
A. I sold it to him on conditions, but he has never paid me for the horse.
Q. What were the conditions?
A. He was to pay me for the horse when he drew his salary that some one was owing him at Muscogee; I don't know how much was owing him or anything about it.
Q. When did he buy your own horse?
A. That was before he was arrested the first time.
Q. How long before?
A. A week before, I guess.
Q. Wasn't it after he was arrested?
A. No, sir.
Q. Do you know that anybody ever saw him ride that horse until after he was arrested?

A. Yes, sir; he has rode the horse around there before he was arrested, and afterwards, too.

Q. You were to send and get his horse and keep it until you got your own?

A. Yes, sir.

264 Q. When he started off down here he said to get that horse and keep it until you got your own?

A. Yes, sir.

Q. So the horse is your' yet?

A. Yes, sir.

Q. The horse he made his escape on and got away is yours yet?

A. It is my horse now, for he has never paid for it; whenever he pays for the horse he can have it.

Q. Do you know of his stopping any other place in the neighborhood except your place?

A. Yes, sir; not right in that neighborood; he has been at John Roach's; he didn't stay there any length of time.

Q. Did you go up to see these dead men?

A. No, sir; I didn't.

Q. Why didn't you?

A. I didn't want to go.

Q. Why?

A. Just because I didn't want to.

Q. Any other reason?

A. That is all the reason I have got; I didn't want to go.

Q. You didn't care about seeing them?

A. Not much; I dind't care anything about them, dead or alive. Whitehead had been there on the Sunday night before that; cut up there, and talked insulting to Florence, and had a right smart to say, and I didn't care anything about them.

Q. Talked insulting to Florence?

A. Yes, sir.

Q. She don't like to be talked to that way?

A. You will have to ask her about that.

Q. Is she that kind of a girl?

A. I don't know.

Q. You have known her a great while?

A. I don't know everything about her.

Q. She likes to have a man talk to her that way, doesn't she?

A. I don't know whether she does or not.

Q. She likes to be insulted, don't she?

265 A. I don't know; you will have to talk to her yourself about that; maybe she can tell you about it.

Q. I expect she would tell me so if I would ask her, but I don't intend to ask her. I have got a wife at home. So you didn't care if these fellows were dead or alive? You were rather glad they were dead, were you not?

A. No, sir; I am not glad to hear of anybody being killed.

Q. But if anybody was to be killed outside of old Hitchcock—you havn't got anything to say about Hitchcock, or any of the rest of them?

A. I don't like to hear of anybody being killed.

Redirect examination by Mr. C. J. FREDERICK:

Q. Whitehead was at your house on Sunday night before?

A. Yes, sir; that was the first time I ever saw him.

Q. How long did he stay there?

A. I could not say how long. He stayed a long time.

Q. What was he there for?

A. He was sitting there talking telling me about being hired to my father. That was the first time I seen him, and I asked him his business, and he said he was hired to my father for a year, and went on to tell me that he was a United States detective, and that Brown Hitchcock told him that if he would stay there and watch my house he would give him fifty dollars.

Q. He did stay there until he got killed?

A. He stayed around father's there.

Q. Who was he going to watch? You?

A. I guess it was me. I don't know. He said that was what he was there for. He first said he was there hired to my father for a year.

266 He said then "I will tell you the truth about it," and he said, "Brown told me to come there and watch your place, and he would give him fifty dollars."

Q. That scared you a right smart, didn't?

A. No, sir; I have never been scared yet.

Q. You were not afraid of his watching?

A. No, sir; anybody else could watch if they wanted to, for all the good it will do them.

Q. Did that seem to be his business there?

A. I don't know; he was sitting there talking to Florence; you will have to talk to her about that; she will tell you.

Q. Did anyone come with him?

A. No, sir; he came alone.

Q. Was he armed?

A. He had a pistol.

Q. You had never seen him before?

A. No, sir; that was the first time I ever seen him.

Q. Brown Hitchcock was your husband? He had given him fifty dollars——

A. Yes, sir; he told him that if he would watch the place, or the house, he would give him fifty dollars; that is what Whitehead told me.

Q. Brown had left you the June before?

A. Yes, sir.

Q. Is that the first time he had ever left you?

A. No, sir; he left once before, about three years ago, I guess.

Q. You didn't tell him to go?

A. No; nor I didn't tell him to come back, either.

The DISTRICT ATTORNEY. You just as good as told him to go, didn't you, when you had Craig around there?

A. No, sir; Craig wasn't there when Brown left.

Mr. FREDERICK (of counsel for deft.). Q. Where was Craig?

A. I don't know where he was, but he wasn't there, and hadn't been there.

Q. How long since he had been there when he left?

267 A. He hadn't been there for something over a year. Brown can't say that he left there on account of Craig and tell the truth.

The DISTRICT ATTORNEY. Why was it he left there?

A. Because he accused me of stealing a gun and some money there.

Mr. FREDERICK. Left you about that?

A. Yes, sir; and on account of another woman.

Q. What was the matter with the other woman?

A. He left me because he thought more of her than me, I reckon.

The DISTRICT ATTORNEY. I thought you said you were going to tell the truth.

A. I am going to tell the truth, the whole truth, and nothing but the truth.

Mr. FREDERICK. Q. Did he go off far?

A. He went in the neighborhood of Vinita, some place.

Q. That is where he went the last time?

A. Yes, sir; he is up there now somewhere in that neighborhood. That is just what he left for.

Q. He thought more of another woman?

A. Yes, sir; he told me that he would never get forgiveness for the way that he hated me, and the way he had treated her; that was three years ago.

Q. There is a divorce suit pending against you now, I believe?

A. Yes, sir; he says there is.

The DISTRICT ATTORNEY. On the ground of adultery?

A. I hope I will gain it.

Recross-examination:

The DISTRICT ATTORNEY. Q. You are charging this on poor old Brown about his being——

A. No, I am just telling the truth on Bro'n.

Q. You had another fellow, didn't you?

A. No, sir.

Q. Own up. Craig is your fellow.

268 A. He is not any more my fellow than you are, not a bit. I had Brown when he staid there at home, and after he left I didn't have any.

Q. You didn't have any after that?

A. No, sir; I guess not.

Q. Florence is a grass widow?

A. I don't know what kind of a widow she is.

Q. You ought to know.

A. You ask her and she can tell you more about her business than I can. I don't profess to keep up with other people's business. It is all I can do to keep up with my own.

Redirect examination:

By Mr. FREDERICK. There was another woman there the night that Whitehead was there?

A. Yes, sir; there was a girl there named Laura Herring.

The DISTRICT ATTORNEY. How old was Laura?

A. I don't know her age; about 14 or 15; just a girl.

Q. She was some relation of Wakoo's?

A. No, sir.

Q. Isn't she Granna Herring's——

A. No, sir; she is a niece of mine; no kin to Wakoo at all.

Mr. FREDERICK. Q. What was it that Wakoo told you about that shooting that night?

A. Wakoo has talked to me a right smart about it. He told me that he killed a man and didn't give a damn who it was, and has told me that several times.

Q. Did he tell you anything about that John Brown did?

A. No, sir; he said John was too slow; he couldn't kill a man if he had to.

Recross-examination:

The DISTRICT ATTORNEY. Wakoo told you that John was too slow?

A. Yes, sir; he has told me that time and again.

269 Q. Too slow how?

A. He didn't say how; he said he was too slow; he said he couldn't kill a man if he had to.

Q. He didn't tell you he was brave?

A. No, sir.

Q. Didn't tell you that John didn't do any firing that night?

A. No, sir; he didn't say anything about that.

Q. He simply said that he killed a man, and that John was too slow?

A. He said, "I killed them both, and I don't give a damn who knows it."

(Witness excused.)

270 EUGENIE HAMILTON, having been duly sworn upon behalf of the defendse, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. Do you know the defendant, Brown?

A. Yes, sir.

Q. Did you see him shortly after this killing occur'ed up there?

A. Yes, sir.

Q. How long afterwards?

A. He came there that night.

Q. Go on and tell us what he said about it, how it happened.

A. When they came to the door they asked us to open the door; they wanted to stay that night; and we got up and opened the door, and they came in, and he says, "I have got in to it again."

Q. Who said that?

A. Wacoo Hampton; and we asked him what, and he said there was two marshals come out on them down there at the fence corner, close to Mr. Shirley's, and asked them if Mathew Craig was in the crowd, and they told them no, and he spurred his horse to go on, and he said to the others, "Let's go,"—said that to the other men that was with him.

Q. Who else was with him, did he say?

A. John Brown and John Roach. He said, "Let's go," and they grabbed his horse by the bridle.

Q. Who did?

A. The marshals, and said, "I guess we will cabbage on to you," and they told him to throw up his hands, and he said, "I can't." He had his pistol in his hand, and he said they said, "Throw your pistol down and

throw up your hands," and he said, "I can't, my hands is cramped," and just as he said that he jumped off on the other side of the horse, and him and the marshals fired about the same time.

271 Q. What did he say about who they were?

A. He said he didn't know who they were, only he knew one of them, but he didn't know who the other one was. He said one of them was Whitehead.

Q. What became of the marshals; did he say anything more about them?

A. Yes, sir; he said he killed them.

Q. Who killed them?

A. He said he done it.

Q. What did he say these other men did who were along with him?

A. He didn't know anything about them, only he said that John Roach got shot in the time of it.

Q. Didn't say anything about what the other men did, what Roach or John Brown did?

A. No, sir.

Q. Did he say how Roach got shot?

A. He said he got shot accidentally; he didn't know how.

Q. Didn't know who it was shot him?

A. No, sir; didn't say.

Q. He and the marshals fired about the same time?

A. Yes, sir.

Q. Did you see any evidence of any wound on him?

A. No, sir; except his eye was red, and he said he was deaf in one ear.

Q. Which ear was it, the ear on the side his eye was red?

A. Yes, sir; his right one.

Q. Did he say how that got hurt?

A. He said he thought that the marshal shot at him and shot so close to him it deafened him for a while.

Cross-examination by the DISTRICT ATTORNEY:

Question. He didn't know how it was done, unless the marshal was so close that it did it. Is that what he said?

A. Yes, sir.

Q. Which one did he say that he killed?

A. He just said he shot them both; he didn't say anything about the rest.

272 Q. Was he talking English or Cherokee?

A. He was talking in English.

Q. Did he talk English pretty well?

A. Yes, sir.

Q. Did he say "I have got into trouble," or "we have got into trouble?"

A. He said "I have got into it again."

Mr. FREDERICK (of counsel for defendant). You are an aunt of Wacoo's, are you not?

A. Yes, sir.

The DISTRICT ATTORNEY. Wacoo is dead, isn't he?

A. Yes, sir.

Q. You are his aunt?
A. Yes, sir.
Q. You are Monroe Hamilton's wife?
A. Yes, sir.
Q. And this defendant was Wacoo Hampton's friend, wasn't he; your nephew's friend?
A. I guess they were friends.
Q. They went around the country together a good deal, did they not?
A. Yes, sir.
Q. They brought whiskey in there together, didn't they?
A. I don't know whether they did or not.
Q. Now, didn't they bring whiskey in at your place about a week before this thing occurred?
A. Wacoo Hampton had some. John Brown was with him.
Q. Where did they get it?
A. I don't know.
Q. Didn't they have six jugs, 3 apiece, of whiskey?
A. I think they had just three jugs.
Q. Are you certain about that? Try to think about it?
A. No, sir; I think that is what they said; I don't know for certain.
Q. They got it at Flax, didn't they?
A. I don't know where they got it.
Q. How many times did they come there at your house with
273 whiskey?
A. Just that one time.
Q. Did you see them any more after that until the night of the shooting?
A. No, sir; not until that night.
Q. What time in the night was it they came to your house?
A. About 12:00 o'clock.
Q. Midnight?
A. Yes, sir.
Q. You let them in?
A. Yes, sir.
Q. Wacoo is a relation of yours?
A. Yes, sir.
Q. And you are a daughter-in-law of old man Hamilton and Mrs. Hamilton?
A. Yes, sir.
Q. Wacoo did the talking?
A. Yes, sir.
Q. Brown didn't do any talking?
A. He didn't speak but one or two words, and he asked where they would sleep.
Q. That was all, was it?
A. Yes, sir.
Q. Which one of the Winchesters did Wacoo have and which one did Brown have?
A. Brown had the one, I reckon, that he always had; Wacoo Hampton had the one that had the blood on it.
Q. Brown had the one that he always had?

A. Yes, sir.

Q. Then he always had one?

A. I think it was Wacoo's; and Wacoo gave him that one and then he took the one from the marshal.

Q. You say that Brown had the one that he always had; did Brown carry that gun always?

A. He had one; but I don't know whether it was that one or not.

Q. Brown had one when they brought that whiskey in there, did he?

A. Yes, sir; I believe he did.

Q. When Brown got to running with Wacoo, Wacoo carried the pistols and Brown carried the gun, didn't they; that is right, is it not?

A. I believe that is the way of it.

274 Q. How long had Wacoo and Brown been running together?

A. Not very long.

Q. How long?

A. I don't know exactly how long it was.

Q. John had a pistol that he got from Isaac Johnson; where was that?

A. I don't know; I think it was at Annie Hitchcock's.

Q. That pistol was at Annie Hitchcock's?

A. I think so; I don't know anything about it.

Q. Did he leave the pistol at Annie Hitchcock's?

A. I don't know whether he left it there or not.

Q. What makes you think it was there?

A. Because Jim Craig had it.

Q. Jim Craig had Brown's pistol?

A. He took it off when he went off; I don't know whether he had it that night or not.

Q. Jim Craig took Brown's pistol when he went off?

A. Yes, sir.

Q. How do you know?

A. That is what they said.

Q. Who said it?

A. I believe it was Wacoo Hampton told me.

Q. Wacoo Hampton told you that Brown had let Jim Craig have his pistol when he went off?

A. No, sir; just left it at Mrs. Hitchcock's house.

Q. For Craig?

A. No, sir; not for Craig.

Q. That Brown had left his pistol at Mrs. Hitchcock's, and that when Craig had come she gave the pistol to him?

A. Yes, sir.

Q. And he went away?

A. Yes, sir; that is the way Wacoo Hampton told me.

Q. How came him to tell you that?

A. He was just talking about John, what he had got, and he said he hadn't got anything.

Q. How come him to leave it at Mrs. Hitchcock's?

A. I don't know, sir.

275 Q. When John came there that night with Wacco, did John have any pistol, or was he just carrying the same gun that he had been carrying since he got to running with Wacoo?

A. I don't know whether he had any pistol or not.

Q. When they brought the whiskey there you say that Brown was carrying Wacoo's gun, his Winchester; is that right?

A. I do not know whether it was Wacoo's or his gun.

Q. He was carrying a gun; was Wacoo carrying a gun?

A. Yes, sir.

Q. They both had Winchesters when they brought in the whiskey, did they?

A. Yes, sir; I think they did.

Q. John was living at your house for awhile, was he not?

A. Yes, sir; he worked there the summer before.

Q. That is where he got acquainted with Wacoo, was it not?

A. No, sir.

Q. Where did he get acquainted with Wacoo?

A. He staid at Mr. Hamilton's, and the winter before he staid at our house the next summer, and he got acquainted with him there.

Q. Was he staying at your house when he went off with Wacoo?

A. No, sir.

Q. Where was he staying then?

A. At the sawmill; working at the sawmill, and then he went to Mr. Manus's, and hired to him.

Q. He went off with Wacoo before he hired to Manus, did he not?

A. No, sir.

Q. You said when he was working at the sawmill he went off with Wacoo; how is that now?

A. He went to Sam Manus's and hired, and then he got to running with this Wacoo Hampton.

Q. Wacoo was on the scout, was he not?

A. Yes, sir.

276 Q. Got to running with Wacoo after he went to Manus's?

A. Yes, sir.

Q. He wasn't carrying his guns and pistols around until after he got to running with Wacoo, was he?

A. Not when he first went there he was not.

Q. It was after he got to running with Wacoo he commenced to carrying the gun and pistol?

A. Yes, sir.

Q. How did Wacoo make a living?

A. I don't know.

Q. He made it selling whiskey, did he not?

A. No, sir; I never knew of his selling any whiskey.

Q. Who fed and clothed him?

A. He just went to anywhere he wanted to.

Q. Sometimes go to your house, sometimes Sam Manus's, and sometimes Annie Hitchcock's?

A. Yes, sir.

Q. Is that the way?

A. Yes, sir.

Q. That is the way he got a living?

A. Yes, sir.

Q. Where did he get his money to buy whiskey with?

A. I do not know, sir.

Q. That 3, 4, or 5 gallons of whiskey that he brought to your house, did Brown furnish the money, or did he furnish it himself?

A. He furnished it himself, I reckon; I don't know where he got it.

Q. Did you know they were going after whiskey when they went?

A. No, sir.

Q. What time did they come in there with whiskey to your place?

A. Just before day awhile.

Q. Did they take it away with them when they left?

A. Yes, sir; Wacoo Hampton took it with him on his horse.

277 Q. They went over to Manus's, did they?

A. That is where they said they were going.

Q. You didn't see anything more of them?

A. No, sir.

Q. How many times have you seen them riding around over the country with guns, Wacoo and the defendant, Brown?

A. I don't know how many times.

Q. A good many times?

A. Yes, sir; several times.

Q. Been to your house a good many times, have they not?

A. Yes, sir.

Q. What did they come over there for?

A. Just to be coming, I reckon.

Q. Come there and get something to eat, and then go off again?

A. Yes, sir.

Q. The two together?

A. Yes, sir.

Q. Did they ever sleep in that loft before that night?

A. Which loft?

Q. The loft they slept in that night? You know they slept in your loft the night of the killing.

A. I don't know whether they slept in there before or not; not as I recollect of.

Q. You know they slept in there that night?

A. Yes, sir.

Q. They got blankets from your house?

A. Yes, sir.

Q. Cold night?

A. Yes, sir; tolerable cool night.

Q. Why did you not let them sleep in your house?

A. Afraid the marshals might run on and get to shooting at them and burn the house.

Q. You did not want them to stay in the house because you were afraid the marshals would run on them?

A. Yes, sir.

Mr. GRACE (of counsel for defendant). It was the family that

278 didn't want them to stay in the house.

The DISTRICT ATTORNEY. Yes; I understand. (To witness.) Who was it that suggested the loft?

A. It was me; I told them to go in the loft to sleep.
Q. It is not a very good place around in that country for marshals, is it?
A. I don't know whether it is or not; you will have to go and see.
Q. You told them to go the loft?
A. Yes, sir.
Q. Brown, you say, didn't say anything; only asked where they were going to sleep?
A. That is all he said; yes, sir.
Q. Didn't say that he hadn't done any killing, or that he did, or not? Didn't tell you that he had anything to do with or not?
A. No, sir.
Q. Didn't say that he had killed Whitehead and the other man had killed Poorboy?
A. No, sir.
Q. Neither of them told you that?
A. Wacoo Hampton just said that he killed them.
Q. Neither of them at any time told you that Wacoo killed one and Brown the other?
A. No, sir.
Q. At no time?
A. No, sir.
Q. Wacoo never told you that?
A. No, sir.
Q. Just simply said he killed them, and that was all?
A. Yes, sir.
Q. Did he tell you that Brown was too slow to kill a man?
A. No, sir; he didn't name Brown at all.
Q. Didn't he tell you that Brown was a brave man?
A. No, sir.
Q. And Brown never said nothing; only asked where they were going to sleep?
A. No, sir.
279 Q. Your husband is not here?
A. No, sir.
Q. Where is he?
A. At home.
Q. How old is your husband?
A. 23 years old.
Q. What is your age?
A. 18.
Q. You are an aunt of Wacoo's; are you Sam Manus's wife's sister?
A. No, sir; I am Wacoo Hampton's father's half sister.
Q. Wacoo's father is not back yet?
A. No, sir.
Q. He is in the pen?
A. Yes, sir.
Q. Your name was Randolph?
A. Yes, sir.

280 JOHN BROWN, the defendant, having been duly sworn in his own behalf, and being examined by his attorney, Mr. C. J. Frederick, testified as follows, to wit:

Q. Your name is John Brown?
A. Yes, sir?
Q. Where were you born?
A. Searcy County, Arkansas.
Q. Are your parents living?
A. My mother is.
Q. Where does she live?
A. In Searcy County, Arkansas.
Q. Have you any brothers and sisters?
A. I have one brother.
Q. No sister?
A. No, sir.
Q. You simply have a brother?
A. Yes, sir.
Q. Where is he?
A. In Searcy County.
Q. Is he older or younger than you?
A. Older than me.
Q. When did you leave Searcy County?
A. I left there three years ago next July, I believe.
Q. How old are you now, John?
A. I am 19 years old.
Q. What is your birthday?
A. 7th day of July.
Q. The 7th of July, next, you will be 20 years old?
A. Yes, sir.
Q. Why did you leave Searcy County?
A. There was no way there that a fellow could make any money, and I thought I would 'nock around and look at the world, and maybe I could find some place I could make some money.
Q. With whom did you live before you left up there?
A. I lived with my mother?
Q. Did your mother know where you went?
A. She knew where I first stopped at?
Q. Where did you first stop?
A. In Polk County.

281 Q. How long?
A. I staid there, I don't know exactly how long, about a month I guess; I reckon about that time.
Q. What were you doing there?
A. I was helping a fellow gather up some cattle.
Q. That was in Polk County.
A. Yes, sir.
Q. Where did you go from there?
A. I went from there to the Arkansas River almost, in the same county.
Q. What did you do there?
A. Picked some cotton.
Q. How long did you remain there?

A. I staid there three or four weeks; I don't know exactly how long.
Q. Where did you go from there?
A. I come to the Nation.
Q. How come you to go to the Nation?
A. I heard it was a good place to make money; plenty of money there, and wages good, and I thought I had better go.
Q. Did you go up in the Indian country the first time alone?
A. Yes, sir.
Q. Where did you go to?
A. I come in the Sequoyah District, Cherokee Nation.
Q. To whose house or place did you go?
A. I don't remember the man's name now; I didn't stay with him but a little while.
Q. Where did you go from there?
A. Back down in the State.
Q. Where did you go in the State?
A. Franklin County.
Q. Did you go back home?
A. No, sir.
Q. What did you go down in the State for?
A. I was going back home, and I passed a little town or place, and there was a fellow came out and wanted to know if I wanted to hire.
Q. What place was it?
A. A place called Lone Elm, and I told him I didn't care about it.
Q. How long did you stay down there?
282 A. I staid there a month and a half.
Q. What did you do?
A. I farmed.
Q. Who for?
A. A fellow named Lige Hunter.
Q. Where did you go from there?
A. I came back up in the Nation at Hamilton's.
Q. Did you see any of the Hamilton folks when you went up there the first time?
A. No, sir.
Q. What did you leave down in Franklin County for?
A. My time was up and I didn't know of anybody else wanted a hand and I thought I would hunt me some more work.
Q. You went up to Hamilton's and worked up there?
A. Yes, sir.
Q. Did you ever have any trouble before this?
A. No, sir.
Q. Were you ever charged with any violation of the law at all?
A. I was charged with cutting a tree on a cow once.
Q. Before you left your mother's?
A. No, sir.
Q. Afterwards?
A. Yes, sir; I was in a crowd——
Q. Chopped a tree that fell on a cow?
A. Yes, sir; this tree that I cut fell against another tree and knocked it down, and it fell on a cow.

Q. Is that the only thing you were ever charged with?
A. Yes, sir; that is the only thing I was ever charged with killing.
Q. Where did you first see Wacoo Hamilton?
A. Up there in the Nation where he lived.
Q. Before or after he was sent off to the reform school?
A. Before he gave up.
Q. After the killing of the man?
A. Yes, sir.
Q. Where did you see him?
A. He come to Dr. Hamilton's house, him and his father.
283 Q. Did you get acquainted with him then?
A. No, sir; him and his father didn't stay there but a few minutes until they went off.
Q. Did you see him any more until he came back from the reform school?
A. Yes, sir; I saw him after he gave up.
Q. Were you acquainted with him before he was sent away?
A. I wasn't exactly acquainted with him, but then I knew him when I seed him.
Q. It is said that he came back from the reform school sometime last October; I suppose that is about the time, is it not?
A. I don't remember just when.
Q. How long had he been back before you saw him?
A. About three weeks.
Q. Where did you see him?
A. I was at Doctor Hamilton's and he came there.
Q. How long did he remain there then?
A. He come there in the morning and staid, I believe, until 12:00; he eat dinner there.
Q. How long did you see him before you went to Manus's?
A. That was the first time I saw him after he came back.
Q. Did you see him any more until he went up to Manus's and you went with him?
A. No, sir; he told me that Manus wanted to hire a hand to build a barn.
Q. You knew at that time, did you, that Manus's wife was his mother?
A. Yes, sir.
Q. Did you walk there?
A. Yes, sir.
Q. He walked, did he?
A. Yes, sir.
Q. You hired to Sam, did you?
A. Yes, sir.
Q. How long did you work for Sam?
284 A. I worked there two weeks, I reckon; maybe not that long; I don't know exactly.
Q. How long before these men were killed on the 8th of December had you been at Sam's?
A. I had been there from the time I had hired to him. I don't know exactly the time I hired to him; but I had been there, I reckon, three weeks.

Q. Made Sam's your home?
A. Yes, sir.
Q. Were you with Wacoo Hampton much from that time?
A. Not only when he came there at Sam's.
Q. Was he there often?
A. Sometimes he would come and stay all night; and get on his horse and leave the next morning, wouldn't come back for two or three days.
Q. How long did you actually work for Sam? You went to work shortly after you went there, I reckon?
A. I went to work the next morning.
Q. How long did you work?
A. I reckon about 2 weeks.
Q. Did you leave and go off with Hampton any time during that time you were working for Sam?
A. I would go over to Hamilton's with him. When he was riding I would get him to set me across the creek.
Q. Set you across how?
A. On his horse.
Q. That is at Barren Fork Creek that you are talking about?
A. Yes, sir.
Q. Did you ever go out of the Territory with him?
A. I went out with him once.
Q. How long before this killing?
A. I don't know exactly how long it was.
Q. Was it a day, or a week, or how long?
A. It was a month, I guess.
285 Q. You hadn't been up there a month when—I mean did you ever go out of the Territory with him? You say you did once. Was it before you went up to Sam Manus's that you went out of the Territory with him?
A. No, sir; after I went to Sam's.
Q. Was it before or after you had finished your work at Sam's you went with him?
A. It was after I had been at work at Sam's.
Q. It wasn't a month then, was it?
A. I told you I didn't know exactly how long it was.
Q. It was after you had been at work at Sam's?
A. Yes, sir.
Q. Was it after you had finished the barn?
A. I don't remember whether we had finished the barn or not. We didn't work steady on the barn; nor we didn't work every day. Some days we would be working, and sometimes we would be down on the Illinois River fishing.
Q. Who?
A. Me and Sam. Wacoo sometimes would go when he would be there.
Q. Where did you go to out of the Territory when you went with him?
A. Went up to Flax's.
Q. What for?
A. Wacoo wanted to get some whiskey.
Q. How much did you get?

A. It was either 6 or 6 and one-half gallons; I don't know which; one or the other.
Q. How did you carry it?
A. Carried it on horses.
Q. Did you have a horse apiece?
A. Yes, sir.
Q. Whose horse did you ride?
A. Sam Manus's.
Q. Where did you bring the whiskey to?
A. Sam Manus's.
Q. How many jugs.
A. I believe we had four jugs.
Q. Who paid for t'e whiskey?
A. Wacoo Hampton.
Q. Whose money?
A. $14.80, I believed, belonged to Sam Manus.
286 Q. Who' was the other money?
A. It was Hampton's.
Q. How much money did you spend in it?
A. None.
Q. How come you to go?
A. He wanted me to go with him.
Q. Who?
A. Hampton and Manus, too. He asked me if I would go; Manus did.
Q. Furnished you a horse?
A. Yes, sir.
Q. In whose hands did he put the money?
A. In Hampton's.
Q. Gave the money to Hampton?
A. Yes, sir.
Q. Brought the whiskey back to Sam's?
A. Yes, sir.
Q. Is that the only trip you ever made over there?
A. Yes, sir.
Q. What did you do with the whiskey?
A. Drank some of it, and Hampton sold some of it.
Q. Did Sam pay you any money for the work?
A. No, sir.
Q. What did you get for your work?
A. I got a suit like this coat; coat, pants, and vest.
Q. That is what you got for your work?
A. Yes. sir.
Q. Did Sam pay you anything for going for the whiskey?
A. He gave me a little whiskey, I believe.
Q. Don't believe about it; you know whether he did or not; you did get whiskey?
A. Yes, sir.
Q. Gave you whiskey for what, to sell?
A. No, sir. When they would be drinking they would give me some.
Q. Did you sell any?
A. No, sir.

Q. Were you with Wacoo when he sold any?
A. I saw him sell a quart one day, I believe.
Q. Where?
A. On Barren Fork.
Q. On whose place.
A. On John Shirley's place.
287 Q. Who else sold whiskey?
A. Sam Manus, I believe; I suppose he sold some; he took some off and sold it; I don't know whether he sold it or not; I didn't go with him.
Q. The day of the killing you were at Sam Manus's?
A. Yes, sir.
Q. Who all was at Sam's?
A. Me and Wacoo Hampton, Neola Pidgeon, Ball Christie, and two little boys there, Watt and Jim Hampton.
Q. What were these other men doing there?
A. Sam Manus had been over there in the Christie settlement and he told these fellows that he had some whiskey over there, and they came over there to get so'e.
Q. Did they get any?
A. They pawned a pistol for a pint.
Q. Which one did that?
A. That one was Neola Pidgeon, I believe.
Q. How come you and Wacoo to go off together that evening?
A. We just took a notion to ride off.
Q. Where did you go start?
A. To Annie Hitchcock's.
Q. Did you carry any whiskey?
A. Hampton had two quarts.
Q. How did he have it?
A. Inn his overcoat pockets, tied on the saddle behind him.
Q. In two quart bottles?
A. Yes, sir.
Q. He was riding?
A. Yes, sir.
Q. How were you?
A. I was walking.
Q. What arms did he carry?
A. He had two pistols and a Winchester, and he got me to carry the Winchester.
Q. He carried two pistols?
A. Yes, sir.
Q. One pistol had been pawned for the whiskey?
A. No, sir.
Q. What did he do with that pistol?
A. He left it at Sam Manus's.
Q. What time did you leave Sam's to go down to Annie Hitchcock's?
288 A. About, I reckon, half an hour by sun, or three-quarters.
Q. Where did you and Hampton start that evening?
A. To Annie Hitchcock's.

Q. What did you start there for?

A. Hampton had been talking to Florence Blevins, and he wanted to go and see her.

Q. Simply went to see his girl?

A. Yes, sir.

Q. What did you go for?

A. I went along with him.

Q. Had you ever been there before?

A. Me and Wacoo and this Frank Hamilton went there one time before.

Q. Did you stay all night there that other time you went?

A. I believe we did; I don't know whether we staid until plumb day or not.

Q. You heard what Frank Hamilton said about it; I guess that was about right, was it not?

A. I don't remember now.

Q. You went down to Annie's; who was there?

A. There was Annie, Florence Blevins, John Roach, and Caywood; I believe that was all there was there.

Q. They were there when you got there?

A. Yes, sir.

Q. Was it dark when you got there?

A. Yes, sir.

Q. What time did you leave Sam's?

A. We left there, I told you, about half an hour or three-quarters by sun.

Q. Had you been drinking any during that day before you left Sam's?

A. No, sir; I don't believe we drank any before we left Sam's.

Q. Didn't Wacoo drink any?

A. No, sir; he wasn't much hand to drink.

Q. How were you? Are you much hand to drink when you get it?

A. I can drink it.

289 Q. I am not asking you what you can do. That is a physical possibility, but did you? Do you satisfy your system when you can get it by drinking it?

A. I don't to say like whiskey; I do drink it sometimes.

Q. I will ask you as a matter of fact, did you drink any before you got down to Annie's that night?

A. Yes, sir.

The DISTRICT ATTORNEY. He has said he didn't.

Mr. FREDERICK (of counsel for defendant). He says he didn't drink any before he left Sam Manus's.

Q. Did you drink any before you got down to Annie's that night?

A. Yes, sir.

Q. How many times?

A. I believe two.

Q. Did you drink any after you got there?

A. Yes, sir; I believe Hampton passed his bottle there twice before he left.

Q. Did you drink there?

A. Yes, sir.

Q. Did you drink every time it was passed?
A. No, sir.
Q. How many drinks did you take there? If you know, tell us?
A. I took two drinks, I believe.
Q. Roach was there when you got there?
A. Yes, sir.
Q. Do you know what Roach was doing there?
A. No, sir.
Q. How long did you stay there?
A. We staid there, I reckon, half an hour; maybe not that long, quite.
Q. You left then?
A. Yes, sir.
Q. Wher' did you go then?
We went up to Cob Hill.
Q. What did you leave there to go to Cob Hill for?
A. Roach took Wacoo out of doors, and was talking to him; I don't know what he told him, and Hampton came back in the house and asked me if I wanted to go up the creek with them. I asked him where to, and he said "Up the creek about two miles;" never told me what
290 certain place he was going to, and I told him I didn't care, just as leave knock around a little as not.
Q. What did he want to go up there for?
A. I don't know; I never asked.
Q. He didn't say?
A. No, sir. And he said, "Let's go," and he went back to Roach and told Roach he would go with him up there to Cob Hill. After we got started Roach told me where they were going. He told me he was going up to Cob Hill to meet Jim Craig.
Q. What for?
A. He said that he had promised to meet Jim Craig there that night at 9:00 o'clock.
Q. Promised who? Roach had promised Jim Craig?
A. Yes, sir; and we goes on up there and comes back. Craig wasn't there.
Q. How long did you stay there?
A. We stopped, I reckon, about a quarter of an hour.
Q. Did you drink any on the way?
A. Yes, sir.
Q. How many drinks?
A. I believe I taken three drinks.
Q. You took two on your way down to Annie, and twice while you there, and three made seven. How long did you stay there?
A. I reckon about a quarter of an hour, maybe a half.
Q. Where did you go then?
A. Came on back; started to Annie's.
Q. You say "we," meaning Roach, Hampton, and yourself?
A. Yes, sir.
Q. Started where?
A. Down to Annie Hitchcock's.
Q. Come back the same way you went?

A. Yes, sir; coming back the Cincinnati and Tahlequah road.
Q. Did you drink any on the way back?
A. I believe we drank one dram going back.
Q. That would make 8 drinks for you that night. Where did
291 you go?
A. We came on back to old man Shirley's at the spirng bridge, and I was riding behind Roach——
Q. You rode behind Roach all the way up there and back?
A. Yes, sir; Roach's horse stopped to drink, and Hampton's horse was past; he was a pacing horse, and he paced off; I reckon he meant for us to catch him.
Q. How far was the branch from the house?
A. 50 or 75 yards, maybe further; I never did notice.
Q. Where is the branch with regard to Shirley's stable?
A. Up above it a little.
Q. Did you pass along by the branch not very far from the stable?
A. Yes, sir.
Q. Then you went on down to the house?
A. Yes, sir; when we got down by that house Hampton was out—these fellows was out on the outside of the gate talking to Hampton.
Q. "These fellows." You mean by that the men who were killed?
A. Yes, sir.
Q. Where did you see them?
A. Standing on the outside of the gate talking to Hampton when we got up even with the gate.
Q. When you first saw them they were on the outside?
A. Yes, sir.
Q. Doing what?
A. Talking to Hampton.
Q. Hampton had stopped?
A. Yes, sir.
Q. Was he on his horse?
A. Yes, sir.
Q. You were riding behind Roach?
A. Yes, sir.
Q. Were you carrying the Winchester still?
A. Yes, sir.
Q. What did Roach have?
A. A double-barrel shotgun.
Q. Hampton was talking to them there by the gate, you say?
292 A. Yes, sir.
Q. What did Roach have?
A. A double-barreled shotgun.
Q. Hampton was talking to them there by the gate, you say?
A. Yes, sir.
Q. What became of you; did you ride on?
A. Yes, sir; we rode on a little piece past them, and Hampton said, "Hold on boys," and we stopped; he came on down where we were at.
Q. Hampton left these men?
A. Yes, sir; and these fellows came right on behind him.
Q. Did you know who these fellows were then?

A. I had seen Whitehead once.

Q. Did you recognize either one of them then?

A. No, sir; I didn't recognize one of them. One of them I thought I knew.

Q. Who did you think it was?

A. I thought it was Whitehead.

Q. These fellows came on down where you had passed them, and Hampton came on down, and they came on down following him; were they following him?

A. Yes, sir; right behind him.

Q. Go on, now.

A. I said, "Hampton, what did you want with those fellows?" And he said, "I just wanted to talk to Whitehead a little." And I said, "Well, I guess we might as well go on, you have been talking to them." And he said, "Well," and he started his horse for us to go, and these fellows when they first came up to me and Roach they asked me and Roach if either one of us was Mathew Craig, and we told them no.

Q. Who told them?

A. Me and Roach.

Q. Did you both say no?

A. Yes, sir.

Q. I want you to tell what each one said.

293 A. They staid there a little bit, and he said, "Is Mat Craig in the crowd?" White said that, and I told him no. He was standing there with his pistol in his hand then.

Q. How near to you was he?

A. He was about as far as that wall there I guess [indicating about 10 feet]. And then this other fellow was standing there in front of Hampton's horse.

Q. How close was Hampton to him?

A. As close as that table over there [indicating 6 or 8 feet].

Q. Who was talking to you?

A. Whitehead.

Q. Where was the other man with regard to Hampton?

A. Standing right in front of Hampton's horse. After Whitehead was talking this other fellow said, "Where are you fellows going?" I didn't think it was any of his business, and I said, "I guess we are going to hell." That is just the words I told him. Hampton said, "Well, let's go," and we started, and these fellows—this fellow we didn't know—grabbed Hampton's horse on the bridle rein, and he said, "I guess, by God, we will cabbage on to you fellows."

Q. What did the other fellow do?

A. He was standing there; this fellow we didn't know said that, and this Whitehead ordered us to get down, and this other fellow we didn't know had his Winchester pointed at Hampton's head, hold of the bridle reins with the other hand. When Whitehead told us to get down Hampton jumped off on the far side from this fellow we didn't know, and this fellow turned his horse loose then.

Q. Who turned his horse loose?

A. This fellow we didn't know turned Hampton's horse loose, and run around there where Hampton was, around the horse, and throwed down on

him again and told him to drop his pistol. Hampton had his pis-
294 tol in his hand, and Hampton said. "Wait, wait, my hands is cramped," and he didn't fire; he was waiting on him, I reckon, and he didn't shoot; and Hampton was moving, walking around, wasn't standing still, and he thought he had a chance, I reckon, and he throwed up his pistol and went to shooting.

Q. At Whitehead?

A. No, sir; at this man I didn't know who; I don't know where he shot him.

Q. Did he shoot more than once?

A. He didn't then; I would not say for certain, but I think that the second shot that he fired this fellow fell.

Q. What did the fellow do?

A. He just fell. Still, before he fell, he shot two shots.

Q. He is the one that had the Winchester?

A. Yes, sir; he had shot two shots out of the Winchester, and he had the guard thrown down, lacked about that much (indicating) of being ready to shoot again.

Q. Let's see what you and Roach and this other man were doing. They told you to get down?

A. Roach told me—when Whitehead ordered us to get down, Roach said, "Get down, John," and I said well, and I just jumped down from behind.

Q. Did you get down on the same side that Whitehead was on?

A. Yes, sir. And Roach got down then.

Q. Which side did he get on?

A. Got down on the same side I did.

Q. All three on the same side of the horse, then?

A. Yes, sir. Hampton and this other fellow that was shooting—as quick as Roach got off the horse he run off.

Q. Had the shooting of Hampton and the other man occurred before you and Roach got off your horse?

295 A. Yes, sir; just about the time we got down, or commenced to get down. And this Whitehead spoke to Roach and me to drop our guns, and Roach said he stooped down to lay his gun down and Whitehead shot him.

Q. That is what he said; you tell what he did?

A. After Roach got shot——

Q. You have not told what Roach did. You have told what he said; what did Roach do when he told him to lay down the gun?

A. I never saw him.

Q. You don't know what he did?

A. No, sir; I don't know what he did: I don't know whether he laid the gun down or no*r*, or whether he still kept it.

Q. What did you do?

A. When Whitehead ordered us to lay our guns down, I just set the breech of mine down on the ground, and about the time I set it down on the ground there was a ball struck my pants here and come out right here. The pants are down in the jail now. I thought then I had better get away from there if I could, and if I co uld not I would have to go to shooting or something.

Q. What did you do?

A. I throwed up my gun, and shot one shot; I don't know whether it hit anybody or not.

Q. What was going on when you shot that shot?

A. Hampton was shooting both pistols as fast as he could.

Q What was the other man doing?

A. He was dead.

Q. What was Whitehead doing?

A. He just fell.

Q. Did he fall before or after you fired?

A. After; about half a minute after I fired.

Q. How many shots had he fired?

A. Four shots.

Q. Whitehead had?

A. Yes, sir.

Q. What was he shooting?

A. A 45 pistol.

296 Q. Do you know where that ball came from that went through your pants?

A. Came from Whitehead.

Q. Didn't come from where Hampton was shooting?

A. No, sir.

Q. Was Roach shot before Whitehead fell?

A. Roach was shot before Whitehead fell; before I was shot. Whitehead said to lay our guns down and Roach went to lay the gun down and about that time he shot.

Q. About that time he fired?

A. Yes, sir.

Q. How did he fire?

A. He shot one shot and Roach hollered out that he was shot, and then in just in a short time, about half a minute, or hardly so long, that ball struck me in the pants, here.

Q. That is two shots accounted for there. How about the other two man. The first shot you heard from Whitehead was when Roach said, "I am shot?"

A. Yes, sir.

Q. Did he keep shooting?

A. He turned then and shot at me.

Q. Did he just shoot one shot and then stop or shoot on?

A. He shot on; it didn't hit me.

Q. At the time you shot your gun he was shooting and firing his pistol?

A. Yes, sir.

Q. Is that the only shot you fired?

A. Yes, sir.

Q. What did you do then?

A. I just stood there, and when Roach and Hampton got ready we left.

Q. By this time both men were dead, were they?

A. Yes, sir.

Q. Where did Roach go?

A. He was there.

Q. Did he run off at once?

A. No, sir.
Q. Did you folks overtake him?
A. No, sir; he was there on the ground.
297 Q. You heard what Roach said about it; that he went off and you all followed him?
A. He is mistaken. I thought when he told it that he didn't know what he was talking about, because from his actions and talk his arm was hurt so bad he didn't know what he was doing.
Q. How long did you remain there at that place?
A. I don't know exactly how long.
Q. Did you remain or leave shortly?
A. We left in about 5 minutes, or hardly so long.
Q. What did you do with the two men?
A. Never did nothing.
Q. They say you took the gun and pistol?
A. He asked me if I had got Whitehead's pistol, and I said no. Hampton got the gun and pistol.
Q. Did you take any money out of anybody's pockets?
A. No, sir.
Q. Did you see Hampton go into anybody's pocket?
A. He said he felt in Poorboy's pocket; that is all I know about it.
Q. Right there in that connection, you heard what Sam Manus said after you got to his house that night; you heard Sam Manus say that you said that three dollars was all the money that Whitehead had?
A. Well, he lied.
Q. And that Whitehead said that Bruner had no money; didn't have a cent; did you hear that conversation?
A. Yes, sir.
Q. Did you say that?
A. No, sir; I did not.
Q. Did you get any money from them?
A. No, sir.
Q. From anybody there?
A. No, sir.
Q. Did you say that to Sam Manus?
A. No, sir.
Q. In his presence?
A. No, sir.
Q. In anybody's presence?
A. No, sir.
Q. At any time?
A. No, sir.
298 Q. You never did?
A. No, sir.
Q. Did you get anything from them.
A. No, sir.
Q. After that you left?
A. Yes, sir.
Q. Where did you go?
A. Down to Annie Hitchcock's.
Q. Did Roach go with you?

A. Yes, sir.

Q. How did you go?

A. I walked along with him until we got his horse, in about 100 yards, I reckon.

Q. How did Wacoo Hampton go from the place of that killing down to Annie Hitchcock's?

A. He walked about half way, I reckon, and he got his pony.

Q. When he got his pony what did he do?

A. He led it on down.

Q. What did Roach do when he got his pony?

A. I helped him on his pony.

Q. Then you went on down to Annie's?

A. Yes, sir.

Q. Then what?

A. Got down to Annie's and I helped him off his horse and led him in the house.

Q. Where did you go?

A. Staid there a little while and went to Sam Manus's.

Q. What arms did you carry away with you when you left Annie Hitchcock's?

A. The same gun I had.

Q. Did you carry any pistol?

A. No, sir; I didn't have any pistol.

Q. What arms did Wacoo Hampton carry away from there?

A. He had two pistols and this Winchester.

Q. What did he do with the other one?

A. He left one of them, I think, at Mrs. Hitchcock's.

Q. He had two that night?

A. Yes, sir; he had two.

Q. And he took one away from Whitehead after the killing?

299 A. Yes, sir.

Q. Took a Winchester away from the other man?

A. Yes, sir.

Q. When you left there you say you left that Winchester?

A. Yes, sir.

Q. Hampton went away with you from Annie's?

A. Yes, sir; I think he had two pistols.

Q. The same pistols that he carried down there?

A. I don't recollect whether they were or not; anyhow he had two pistols and a gun.

Q. Did you exhibit the pistols up to Sam Manus's and show the gun and pistol that had blood on it?

A. I never showed any gun at all.

Q. Did Wacoo Hampton?

A. He showed Sam Manus the gun that he got from this fellow.

Q. Did he show the pistol?

A. I don't remember whether he had the pistol or not.

Q. Did you know Tom Caywood?

A. I had seen him twice, I believe.

Q. Did you tell Tom Caywood, down ther' at Annie's that night, that you had laid out two marshals?

A. No, sir.
Q. And that "that is no lie?"
A. That is a word I never used in my life; I never did speak that.
Q. That is a new western phrase to me, too.
A. That is a word I never used in my life.
Q. What did you tell Caywood about it?
A. I don't remember of speaking to him.
Q. What did Wacoo Hampton say?
A. I don't know; I was out of doors, talking to Mrs. Hitchcock.
300 Q. Did you hear Wacoo Hampton say that he had killed two marshals?
A. He said that he got into trouble.
Q. I suppose that he told about it?
A. If he did he told it while I was out of doors.
Q. At any rate you say you didn't tell Tom Caywood you had killed two marshals?
A. No, sir; I didn't tell him that.
Q. Did you tell Sam Manus "I killed one of them?"
A. No, sir.
Q. Did you tell Sam Manus you had killed any marshal or killed anybosy?
A. No, sir; I just told him we had got into some trouble, I believe is all I said. We didn't stay at Sam's more than ten minutes, I don't think.
Q. You went to Hampton's?
A. Yes, sir.
Q. Did you tell him you had killed anybody?
A. No, sir.
Q. Did you hear Wacoo tell old Dr. Hamilton about having killed the men?
A. He said he had killed two men and showed the gun with the blood on it.
Q. Do you remember the old doctor asking you if you got into such trouble as that, John, and you hanging your head down?
A. No, sir; I don't remember I said that.
Q. Did you arm yourself and run off to keep out of the way of the marshals?
A. I never kept out of the way.
Q. What were you going around with Wacoo Hampton after that for, armed?
A. I was living with Sam Manus, and Wacoo would come there and we would go off around in the neighborhood to the houses there.
Q. Had you seen Brown Hitchcock that day or the day before?
A. No, sir.
Q. Did you know of his being down there in that country?
301 A. No, sir; I didn't know where he was.
Q. Did you know anything about Brown Hitchcock trying to arrest Craig for having lived in adultery with his wife?
A. No, sir.
Q. Did you know anything about Craig having been arrested on such a charge and getting away from the officers?

A. I heard of his being arrested; I didnt know what it was for.
Q. Were you acquainted with him?
A. No, sir; I had seen him twice. He subpœnaed me once, to go to Talequah as a witness.
Q. There are two Craigs spoken of, Mathew and Jim?
A. I met Mathew Craig once.
Q. Were you acquainted with Poorboy?
A. No, sir.
Q. Had you ever seen him?
A. No, sir.
Q. Were you acquainted with Whitehead?
A. I had seen him one time.
Q. When was that?
A. Sunday night; Wacoo Hampton was there to.
Q. Is that the only time you had ever seen Whitehead?
A. Yes, sir.
Q. Did you know what Whitehead was down there for?
A. Not that time, I didn't.
Q. From whom did you learn what he was down there for?
A. I have not yet learned, only what I learned, I believe, from Mrs. Hitchcock?
Q. Before or after the killing?
A. After the killing, I believe.
Q. Did you learn anything about it before the killing?
A. No, sir; I don't think I did.
Q. Did Annie Hitchcock ever tell you anything about it before the killing?
A. No, sir; I don't think she did.
Q. Do you know whether or not she had told Roach anything about it?
A. No, sir.
302 Q. Do you know whether or not she had told Wacoo Hampton about it?
A. I don't know anything about that.
Q. Did you know that Whitehead was staying down at Judge Shirley's?
A. I heard somebody say something about his stopping there.
Q. Before or after the killing?
A. I believe I heard somebody say, I don't remember who, that he was staying there.
Q. You learned that that night he was at Annie's, did you?
A. I believe it was; I don't remember exactly.
Q. Did you learn anything about his business down there that night?
A. No, sir.
Q. I suppose you guessed his business was the same as yours Sunday night, didn't you?
A. They said he had been there two or three nights before this Sunday night, and he talked to this Florence Blevins.
Q. You went down there thinking you would have some fun with the girls?
A. Not exactly that way.
Q. Well, with some of them. There was three there, wasn't there? Annie, Florence, and Laura Herring?

A. Yes, sir.

Q. You didn't go back there from that Sunday night until the Tuesday night of the killing?

A. No, sir.

Q. Why didn't you stay and see the girls that night instead of going off with these fellows?

A. I didn't know what they were going for; I 'lowed maybe they would come back directly.

Q. You didn't know until you left there that these men were going to meet Jim Craig?

A. No, sir.

Q. You still had some whiskey on hand?

A. Yes, sir.

Q. Roach says he never asked you to go?

303 A. He talked to Hampton; I don't know what he was talking to him about.

Q. Hampton asked you to go?

A. Yes, sir.

Q. What did he say?

A. He said he wanted me to go with him and John Roach up to Cob Hill to meet Jim Craig.

Q. Was John Roach present when he said that?

A. No, sir; he was out on the porch then talking to Annie, I think.

Q. Did you leave any men there?

A. Just as we started off this Neola Pidgeon and Ball Christie came up to the gate; they were the same fellows that was up at Sam's that day.

Q. The same fellows that pawned their pistol for a pint of whiskey?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Question. What did you say you went to Annie's for?

A. Just to have some fun.

Q. What kind of fun?

A. Just talking and deviling each other.

Q. Just doing nothing but talking with the girls?

A. I don't know whether we intended to do anything else or not.

Q. Did you intend to sleep with them?

A. No, sir; I didn't. There was nobody there I would sleep with.

Q. Why?

A. Because I didn't want to.

Q. Too ornery?

A. I don't know as they were.

Q. Was that your idea in you fellows going down there, to a kind of a house of prostitution?

A. We wanted to have some fun.

Q. You had a great deal of fun before you got through with it?

A. We had enough.

304 Q. Enough to satisfy one boy. You went down to the house, you and Wacoo. Wacoo had been talking with Florence Blevins. Did he have any arrangement made with her?

A. I don't know.

Q. How do you know that he had been talking to her?
A. I knew that he had been talking to her?
Q. You went down there to laugh and chat, simply, with the girls?
A. Yes, sir.
Q. Why did you leave? What was the sense of your going away with them and riding two on a horse?
A. They wanted me to go along with them.
Q. If there were three horses there I could understand, but why double up?
A. I don't know what was their cause for *for* wanting me to go.
Q. What did you take the gun for; why didn't you leave it there?
A. I didn't wont to leave it.
Q. Why?
A. Because it didn't belong there and I didn't have to leave it there.
Q. Did you think you were going to come back again? You thought that the boys were going to come back?
A. Yes, sir.
Q. That would be your way home to come back there?
A. Yes, sir.
Q. Why carry your gun with you in the night?
A. I didn't know what I might see after night.
Q. Where you went did you expect to see something?
A. There is a heap of game in that country, and a fellow might ride across a deer or anything.
Q. You are a pretty good rifle shot to kill a deer at night?
A. I can kill one when I see one.
Q. Was it a moonlight night?
A. Yes, sir.
305 Q. It wasn't, for the moon did not rise until 12:00 o'clock.
A. It was shining then, for a fact.
Q. The almanac has been introduced in evidence here showing that it did not shine.
A. I don't care what the almanac says; it was shining then.
Q. If that is the case you went there after midnight, and did the shooting after midnight.
A. No, sir; it wasn't after midnight.
Q. Now, you got back to Annie's, she says, at 8:00 o'clock, sharp; it was about half past 10 when you got home; the mûn did not rise——
Mr. FREDERICK (of counsel for defendant). I submit that the gentleman ought not to argue with the witness.
The DISTRICT ATTORNEY. The almanac says that the moon did not rise until 12:00 o'clock.
The COURT. The district attorney has a right to give the witness a chance to correct himself.
The DISTRICT ATTORNEY. Now, what have you to say about it? The courts all take notice of the almanac——
Mr. FREDERICK (of counsel for defendant). I am not objecting to that.
The DISTRICT ATTORNEY. You have set here and heard all this testimony; you have heard every witness that has testified both on your side of the case as well as on the side of the Government, put this killing not later than 10:00 o'clock; now then, the almanac says that the moon on

hat night didn't rise until 12:00 in this longitude—until after 12:00; you ot back to Manus's about that time. How can you say that the moon was shining?

306 A. Because it was shining.

Q. It was?

A. Yes, sir.

Q. Nature has reversed herself?

A. No matter what the almanac says the moon was shining, and it was, too.

Q. The moon was shining at 8:00 o'clock that night?

A. I don't know whether the moon was shining at 8:00 o'clock or not. I never said anything about it.

Q. Where you were was the moon shining?

A. I said the moon was shining.

Q. You saw it?

A. Yes, sir.

Q. Full moon?

A. I don't remember now whether it was plumb full or not; but anyway it was shining.

Q. When was this?

A. That night that these fellows was killed.

Q. When was that?

A. I don't remember.

Q. 8th day of last December, was it not?

A. That is what they say it was.

Q. What do you say?

A. I don't know, I didn't keep any time.

Q. You are certain that the moon was shining, you are not willing, although I have called your attention to the fact that it could not have been shining, to admit that you are mistaken?

A. If I hadn't noticed the moon shining I might have come to the almanac for it. The moon was shining before we got to Annie Hitchcock's that night.

Q. You got there before dark?

A. No; after we had been up there to this place at Cob Hill and back.

Q. Was it shining at the time you left Annie Hitchcock's to go up there?

A. I don't remember; I don't think it was.

Q. Then you took your gun to shoot game, did you?

307 A. I did not know what I might see.

Q. There was two of you on a horse. Very unhandy to carry two guns, both of you on one horse, each of you carrying a gun?

A. It was no trouble for me to carry it.

Q. You were riding behind?

A. Yes, sir.

Q. No trouble to carry it?

A. No, sir; hold it across in front on the horse.

Q. You took it for the purpose of shooting game?

A. I didn't know what I might see.

Q. Why take it?

A. Because it was no trouble to take it.

Q. You were not very well acquainted with Craig?

A. No, sir; I had seen him twice, I believe.
Q. Did you object to going?
A. I asked them what they were going for, and they said——
Q. What did they say?
A. They said they were going up there to see if they could find Jim Craig.
Q. I understood you to say you never learned that until on your way up there when Roach told you on the way up on horseback.
A. That is when I am telling it now.
Q. I am talking about at the time you started; if you didn't know what they were going for, why go?
A. I don't know exactly, but——
Q. But what?
A. I went.
Q. Are you in the habit of carrying your guns up there after night in that country?
A. A heap of people carry their guns wherever they go.
Q. I am not talking about a heap of people I am talking about you?
A. I have carried it after night.
308 Q. What for?
A. Just to be adoing.
Q. Have you no reason why you carried it? Were you on the scout?
A. No, sir.
Q. Hampton was?
A. I believe he was.
Q. Christie was?
A. No, sir.
Q. Annie says so.
A. He said he wasn't; I know nothing about it.
Q. Craig was?
A. I suppose so, but I don't know what he was scouting for.
Q. Pidgeon was on the scout?
A. I suppose so.
Q. For killing a marshal?
A. No, sir; that is another Pidgeon.
Q. What was this Pidgeon on the scout for?
A. I don't know; Hampton told me he was on the scout.
Q. You can give no other reason for carrying your gun but that you wanted to kill game, and you insist that the moon was shining at the time the shooting occurred?
A. Yes, sir.
Q. Was it shining at the time you were at Cob Hill?
A. Yes, sir; I think it was just coming over the mountain about the time we left Cob Hill.
Q. Did you tell Frank Hamilton what he said here on the stand?
A. If I did I don't remember it.
Q. Will you deny you told him you killed one of these men, and that Wacoo killed the other?
A. If I did I don't remember it.
Q. Do you deny telling him that, and if you told him why did you tell him that, if it wasn't true? You do not deny telling Frank Hamilton that, do you?

A. I don't believe I told him that.
Q. You do not believe you told him?
A. No, sir.
Q. You ought to know whether you did tell him or not? Is
309 that all the better you can answer it?
A. I don't remember.
Q. Why didn't you tell him if it is not true? You ought to be able to say you didn't tell him that if it is not true that you killed one of them?
A. No, sir; I don't think I did.
Q. Don't think you did what?
A. Don't think I killed ary one of them.
Q. Did you tell Frank Hamilton that?
A. No, sir; I don't think I did.
Q. Will you deny positively you did not?
A. I think when he said it he was mistaken; if he heard it it was Hampton told him.
Q. He told us what Hampton said and what you said.

Here court took a recess until 1:30 p. m.

AFTERNOON SESSION, 1:30 p. m.

Q. You went there to Hamilton's after this shooting?
A. Yes, sir.
Q. You did talk with Frank Hamilton, didn't you?
A. I don't remember of having anything to say to Frank.
(Here counsel for the defense called the attention of the district attorney to the fact that he had looked at the almanac wrong; that the moon was shining at the time the defendant stated it was, which the district attorney admitted.)
Q. You had a Winchester all the time?
A. I had been carrying Hampton's for him about a week, I reckon.
Q. You had a pistol when you went to Hamilton's?
A. No, sir; I don't think I had.
Q. You heard Frank Hamilton swear it; do you dispute it; do
310 you deny it?
A. Yes, sir.
Q. Hamilton didn't tell the truth then about that?
A. No, sir.
Q. Is there anybody else you want to contradict in this case?
A. It is owing to how far you go.
Mr. FREDERICK (of counsel for defendant). What is your mother's name?
A. Julia Hamilton; her name was Brown before she married the last time.
The DISTRICT ATTORNEY. You heard Frank Hamilton say that you said you're the man who killed Whitehead, and that Hampton said he killed the other one. Please state if that is true.
A. It is like I told you awhile ago; if I told him that I don't remember it.
Q. Craig was present and heard the conversation, was he not?
A. I don't remember whether he was there then or not.
Q. Was Craig there?

A. He came there that morning.

Q. Did you hear him say that he was at the foot of the hill and heard the firing?

A. I believe I heard him say that he was on top of this Cob Hill.

Q. What were you still carrying Wacoo's gun for when you went over to Hamilton's?

A. He had two pistols on.

Q. What did you say your mother's name was?

A. Julia Hamilton.

Q. What relation is she to these Hamiltons that are here swearing to your character?

A. I don't know whether they are any relation.

Q. I guess you do.

A. These claim relation with them, but them back there don't claim any relation with these.

311 Q. Do these Hamilton's claim relation with your mother?

A. No, sir.

Q. With your step-father?

A. As Doctor Hamilton says, he thinks they are a little kin.

Q. Well, I want to know what you say with regard to Frank Hamilton's statement that you told him that you helped kill*ed* these men; that you killed one man, and that Wacoo shot the other. Your explanation is that you don't remember saying it.

A. I don't remember it if I said it.

Q. What time did you leave Annie Hitchcock's; the second time after the shooting?

A. I don't know what time it was.

Q. Did you leave before the moon set?

A. I don't remember now.

Q. What did you take the gun with you over to Doctor Hamilton's for?

A. I told you that Hampton had two pistols and that I carried his gun for him.

Q. Why didn't you let him carry his own gun?

A. I was riding behind him, and he had the bridle reins in his hands.

Q. You were riding behind him, were you?

A. Sometimes I rode behind him.

Q. Did you ride behind him going from Annie Hitchcock's there?

A. Yes, sir.

Q. You are a white man.

A. Yes, sir.

Q. You state you went for this whiskey*y* about a month before the killing.

A. I said about that long; I could not tell exactly.

Q. Where were you living then?

A. I believe I had just went to Sam Manus's.

Q. The first thing you did was to go after whiskey, was it?

312 A. No, sir; I worked some on the barn.

Q. You have heard Mrs. Hamilton say you carried a gun when you went after whiskey, and that you were carrying it very frequently when you would come to her house with Wacoo. What were you carrying it so much for?

A. I told you once.

Q. What?

A. I told you when I rode behind him he had the bridle reins in his hands.

Q. Were you riding behind him when you went after whiskey?

A. No, sir.

Q. Why were you carrying it then?

A. I was carrying it because I got used to carrying it.

Q. How came you to get accustomed to carrying the gun?

A. I don't know anything about that.

Q. You see that was very shortly after you went over there to Manus's, and you had Wacoo had not been going around very much up to that time, had you?

A. Not very much.

Q. Then you hadn't got accustomed to carrying the gun at that time?

A. I carried it some few times.

Q. Why were you carrying the gun?

A. I told you because I wanted to carry it. That is exactly the reason.

Q. I can go and kill a man because I want to, too, but because I want to is not a very good reason to give. Can you give no further reason?

A. I don't know that I can.

Q. Why were you going around taking whiskey into that country, and taking a Winchester rifle with you everywhere you went? Can you give any further reason?

A. I don't know that I can, I said.

Q. Simply because you wanted to. You admit you carried the 313 gun all the time?

A. I carried it the bigger portion of the time.

Q. He carried the pistols?

A. Yes, sir.

Q. You can give no other reason why you carried it except that you wanted to. You were not on the scout?

A. No, sir.

Q. Wacoo was?

A. He was not exactly scouting.

Q. Then when you carried the gun so much why did you carry it?

A. I told you once. The gun wasn't heavy——

Q. Because you were bring whiskey into the country, wasn't it?

A. I told you that I never went after whiskey but once.

Q. Then give me some better reason why you were riding around with a desperado, carrying a gun all the time. Why were you not at work, behaving yourself, and let your arms stay at home? Can you give an answer to that? You had a living to make; there was plenty of work to do for a man that wants to do it to make a living. Why were you riding around that country with that man, going over to Flax for whiskey, always carrying the gun with you when you went over the country with that escaped convict?

A. He wanted me to go around with him.

Q. If he wanted you to go that is no reason why you should go, and if you should go that is no reason why you should always go armed. I want

you to give some better reason for that than you give. (After a pause.) Well, you can't give a better reason for that. Now, how is it that you men all happened to be at Annie Hitchcock's that night?

A. You will have to ask somebody that knows.

Q. You know the reason you were there.

A. I told you the reason I went there.

Q. Why did you carry a gun with you that night when you went to her house?

A. Because Hampton wanted me to carry it.

314 Q. What did you expect to do with it?

We didn't expect to do anything with it.

Q. Then why carry it? You knew he was an escaped convict, didn't you?

A. Yes, sir.

Q. What were you running around with him for, if you are such a good boy—good young man?

A. I told you once that he wanted me.

Q. Do you go around with every escaped convict, armed, that wants you to?

A. No, sir.

Q. Then why did you do it?

A. I told you that he wanted me to. He furnished me a horse sometimes to ride.

Q. You were running around with an escaped convict, carrying his gun until you got so accustomed to it that you would carry it when you were riding single, go out of the country with him to get whiskey and bring it in there with him, and go with him down there on the night of the killing to the place of the killing. Now, can you give me any reason why you were so intimate, going together so much?

A. When I would want to go anywhere he would want to go.

Q. Did you want to go anywhere that night?

A. I did that evening.

Q. Where did you want to go?

A. I wanted to go over to Mrs. Hitchcock's.

Q. I thought you said you went over there because he wanted you to.

A. No, sir; I don't think I said it.

Q. Did you ask him to go?

A. I don't remember of asking him?

Q. Where had you been that day when Sam Manus met you down there at the Thornton house?

A. We come from his house.

Q. Where were you going?

A. We were going to Annie Hitchcock's.

315 Q. On your way there?

A. Yes, sir.

Q. What were you going there so early for?

A. I would not call it very early myself.

Q. You have said you left half an hour before sundown.

A. It was two miles there, and we started in time to get there by dark.

Q. Where did you leave Christie and Pidgeon?

A. Left them at Annie Hitchcock's.

Q. Why didn't you all go there together?
A. I don't know what is the reason.
Q. What arms did Christie have?
A. He never had any, I don't think.
Q. He didn't?
A. No, sir.
Q. You differ from the others.
A. Mrs. Hitchcock, I think, is just mistaken.
Q. What arms did Pidgeon have?
A. He had a Winchester.
Q. Had you been there at Manus's all day?
A. Yes, sir.
Q. What were you doing there that day at his house while him and his wife were gone? Why didn't you go to work?
A. He didn't have any more lumber to work on the barn.
Q. You had gone away about a month before and got the whiskey; where did this whiskey come from?
A. It was the whiskey I was telling you about before noon.
Q. You had not kept that whiskey a month?
A. We kept it quite a little while; I don't know exactly how long.
Q. I don't know how you kept it a month if Sam Manus and Wacoo were both out selling it—only 6 gallons to start with?
A. After that we got some whiskey from Sam Manus and Frank Hamilton.
316 Q. Frank Hamilton?
A. Yes, s'r.
Q. Frank was introducing, too, was he not?
A. Yes, sir.
Q. Why didn't you tell that before so as to get Frank into it? How much did you get from Frank?
A. They had some in a gallon jug, I don't know how much was in it; it wasn't full, though.
Q. Where did they have it?
A. They had it at John Roach's and Annie Hitchcock's.
Q. Frank Hamilton and Sam Manus had some there?
A. Yes, sir.
Q. How much did they have?
A. They had something near a gallon, I think.
Q. How much did they have at Annie Hitchcock's?
A. They had about a quart, I guess.
Q. When?
A. I don't know what day of the month it was; I believe it was on Monday; I don't know what day of the month.
Q. How much did they have at Roach's?
A. I guess they had about half a gallon, or hardly so much.
Q. Which did you get?
A. Of which?
Q. Of the whiskey?
A. It was all in one jug.
Q. Did you get it from Roach's or Annie's?
A. I drank some at Roach's.

Q. I am not talking about what you drank; I am talking about where you got whiskey that you had at Sam Manus's upon the day of this killing.

A. I got it from Sam Manus and Hamilton.

Q. You simply told me you got a drink.

A. I got a drink at Roach's.

Q. Is that all you got?

A. I got a drink or two there, and then Sam Manus and Frank took a jug on up to Annie Hitchcock's from there.

317 Q. I want to know where you got the whiskey that you drank at Sam Manus's all that livelong day; that you had there at Sam Manus's on the day of this killing?

A. It was some that Sam Manus brought in.

Q. Why didn't you tell me so? Why is it you said that they kept it at Annie Hitchcock's and John Roach's?

A. This is when that first came in; went up to Roach's; went up to Annie Hitchcock's and to Sam Manus's, if you understand anything. There is no use to try to make a fellow tell a lie.

Q. You are in a condition you ought not to get angry; you ought to keep cool. You got it from San Manus and Frank Hamilton; they had it at Annie Hitchcock's and Roach's; is that right?

A. Yes, sir; the time they came in they had it there.

Q. What time did they come in?

A. I don't remember what day of the month it was.

Q. When did they bring it over to Sam Manus's?

A. This, they came in, they drank some of it up at Annie Hitchcock's, and the rest of what they brought in was at Hamilton's.

Q. How long did it stay there?

A. I believe that Manus went and got a gallon, maybe a gallon and a half, the next day.

Q. Don't you know, sir, that you didn't bring that whiskey in until three or four days before this killing, and the whiskey you drank is the whiskey that you and Wacoo brought in there?

A. No, sir; it is not.

Q. You say that you brought it in the month before. Now, you had not been at Sam Manus's but about three weeks, and yet you say you brought it in after you were at Sam Manus's. Now, what have you got to say about that?

318 A. I never said I taken it to Sam Manus's——

Q. You said about three weeks, and I do not intend to let you browbeat me out of that. You did say you were there about three weeks, and you worked about there on the barn; you said you were there about three weeks; that is your exact language, and yet you say you brought this whiskey in a month prior to the time of the killing. How do you explain that?

Mr. FREDERICK (of counsel for defendant). He has explained it.

The DISTRICT ATTORNEY. If he has explained it once he can explain it again. He has never explained it to me that I have heard, or to anybody else. How did you explain that?

A. I told you I did not know exactly what time—how long it was when I went after this whiskey until those fellows were killed.

Q. You said about a month?

A. I said I didn't know exactly how long, but I allowed about a month.

Q. And yet you say you you were only at Manus's for three weeks?

A. I said about three; I didn't know exactly; I never kept any account.

Q. Then you must have brought whiskey in before you went to Manus's?

A. No, sir.

Q. If you had brought whiskey in a month before the killing and you were at Manus's only three weeks before the killing, you must have brought it in first.

A. No, sir; we brought it in after.

Q. Which is true, that you had brought the whiskey in——

A. I told you I didn't know exactly what time it was.

Q. Why are you trying to get the fact of the bringing of the whiskey in so far from the time of the killing?

A. I told you I went with Wacoo Hampton one trip after whiskey,
319 and I told you that Sam Manus and Frank Hamilton brought some in there.

Q. That is not an answer to my question at all. I am trying to find out when you brought that whiskey in. A number of witnesses have sworn here in your presence it was about 4 or 5 days before the killing; you go on the stand and swear it was a month before.

Mr. FREDERICK (of counsel for the defendant). I do not think it is fair to hold him to a month; he first told you it was a month, and then he said it was after he went to Sam Manus's.

The DISTRICT ATTORNEY. That is just what I said to him. How do you get around that? These other people have testified in your presence it was 4 or 5 days before.

A. I guess they know more about it than I do.

Q. They know as much, for they were there; is that right?

A. No, sir.

Q. It is not right?

A. No, sir; it is not.

Q. You heard Dr. Hamilton swear to it, and Frank Hamilton, and Mrs. Hamilton—both of the Mrs. Hamiltons—that you brought that whiskey in about 4 or 5 days before the killing—all four of these people; you say they are not right; then how long was it before? I will give you a chance to state it again.

A. It wasn't less than two weeks, anyhow; that is as near as I can tell you.

Q. Did you hear Wacoo tell Manus on the night that you fellows did this killing, when he met him down there by the Thornton house, that Christie had taken a quart of whiskey from him and he had to take it away from him at the muzzle of the gun?

A. No, sir; he talked Cherokee to Sam Manus.

320 Q. They were talking Cherokee?

A. Yes, sir.

Q. Did he do anything of that kind?

A. Yes, sir; Christie took a bottle of whiskey from him; he had it in his overcoat pocket and he tried to get away with it.

Q. How much whiskey had you up there?

A. Up where?
Q. At Manus's?
A. I don't remember how much we had.
Q. There were four or five of you drinking there out of it all day?
A. No, sir; I don't think I drank any that day.
Q. How did it happen you commenced drinking at night, and not in the daytime?
A. I just wanted to be lively so we could have some fun.
Q Wanted to be lively at night, when you were with the girls; I suppose that is the idea?
A. Yes, sir.
Q. You didn't seem to drink much when you were with the girls; it was when you were riding up there just before that killing that you did the drinking. Three drinks on your way up, and then one there, one on your way down to the place of the killing, 5 right there; that seemed to be the time you were trying to screw your courage up; you seemed to do your drinking then when you started out on that night, started up to meet Craig, or do that killing, whichever it was?
A. We drank a little; I don't remember how many drinks we taken.
Q. You have been swearing it pretty faithfully here?
A. I said I thought we took one or two.
Q. One or two, where?
A. We taken one or two before we got there to Annie Hitchcock's.
Q. You took three on the way up to Cob Hill; you drank one at Cob Hill; that is 6—one or two there?
321 A. I thought you would tell it; you seem to know it; go ahead and tell it.
Q. You are not willing to say?
A. I have told you how many I took.
Q. Two at Cobb's Hill?
A. I think you will find it. I told you we drank two drams at Mrs. Annie Hitchcock's.
Q. Before you got there?
A. At Mrs. Hitchcock's.
Q. Did you drink any on your way over to Mrs. Hitchcock's?
A. I told you I thought that we drank one or two; I don't remember.
Q. Two at Mrs. Hitchcock's is four; three on your way up to Cob Hill—is that right—that is 6; two at Cobb Hill?
A. One.
Q. That is 7? One on the way down to the place of the killing is 8; is that right?
A. I don't remember whether we drank any going down there or not.
Q. That is what you testified to before, making eight drinks, and yet you didn't drink any all day, notwithstanding you were laying around there with these men who were drinking at Sam Manus's. What work did you do while you were at Sam Manus's?
A. I helped him put up a barn.
Q. How many days did you work?
A. I could not tell anything about that.
Q. About how many?
A. I could not tell you.

Q. Some days you said you would go fishing?
A. Yes, sir.
Q. Some days go after whiskey?
A. No, sir.
Q. How long did it take you to go after the whiskey?
A. I don't remember how long we were gone.
Q. How many days were you gone?
A. I believe we were gone two.
Q. How far is it from Manus's to Falx's?
A. I never measured it; you will have to go and measure it.
322 Q. You have ridden it; will you state how far it is?
A. I never measured it; I could not tell you how far it is?
Q. Could you give any idea?
A. It might be 50 or 60, or 100. I don't know.
Q. Well, in your best judgment?
A. 75 miles I guess; I never paid any attention.
Q. Were you just two days in going that far?
A. Two days and one night, I believe.
Q. Did you ride 75 miles a day?
A. No, sir.
Q. If you lived 75 miles and it took you two days—did you ride at night?
A. Yes, sir.
Q. Did you have two horses?
A. Yes, sir.
Q. You claim you didn't carry any whiskey back?
A. No, sir.
Q. What did you go for?
A. I never said I didn't carry any whiskey back.
Q. I will tell you what you did say; you said that Hampton got the whiskey and carried it back. You didn't say you didn't, but I took it for granted you didn't, or else you would not tell that Hampton carried it back and say nothing about yourself?
A. Hampton had four gallons.
Q. How much did you bring?
A. I brought a gallon.
Q. Who carried the other gallon, you had 6 gallons?
A. I believe I had two gallons.
Q. How did you carry yours; you told how Hampton carried his?
A. In a jug.
Q. How?
A. Tied on the saddle.
Q. One on each side, didn't you?
A. Yes, sir.
323 Q. You were very particular to tell the jury how Hampton carried his whiskey when you came back; why didn't you mention that you carried yours the same way.
A. You never asked me anything about mine.
Q. They did not ask you how Hampton carried his either, but you told that. You went 75 miles; did you start out there in the daytime or night?

A. In the daytime.
Q. What time of the day did you start?
A. I don't remember.
Q. In the morning?
A. It seems to me like it was.
Q. You rode all day?
A. Yes, sir.
Q. What time did you get to Flax's?
A. I don't know what time it was.
Q. Were you there in the day or night?
A. In the night.
Q. You got it from Flax's in the night time, and then rode all night long, did you?
A. I never got it from him in the nighttime.
Q. Did you stay there all night?
A. We staid there the rest of the night; it wasn't long until day.
Q. What time did you get there?
A. I don't know; it wasn't long until day.
Q. You rode nearly all night to get there?
A. Yes, sir.
Q. You rode nearly all night the next night to get back?
A. Yes, sir.
Q. Got back about 5:00 o'clock in the morning?
A. I don't remember what time.
Q. I suppose you rode in the nighttime to keep the marshals and people from seeing you?
A. No, sir; we rode in the nighttime and daytime too.
Q. Why were you in such a hurry to ride both nights?
324 A. We didn't want to be gone always.
Q. It was nearly day when you got to Flax?
A. Yes, sir; it wasn't long; I don't know exactly how long.
Q. About 5:00 o'clock in the morning when you got to Hamilton's?
A. I don't remember; I never looked at the timepiece.
Q. Did you stay the rest of the night at Hamilton's?
A. I believe we did.
Q. Where did you sleep?
A. I believe we slept at Doctor Hamilton's.
Q. Where did Wacoo sleep?
A. I think he slept at Monroe's.
Q. His uncle's?
A. Yes, sir; uncle by marriage.
Q. Now then, if you went there about two weeks before this killing occured, what became of that 6 gallons of whiskey?
A. I told you that Manus and Hampton sold that out.
Q. You brought it there for them to sell?
A. I just carried what I had for Hampton.
Q. What did you do it for?
A. Because he could not carry it.
Q. What did you go for?
A. I went for whiskey.
Q. What did you want with the whiskey?

A. Wanted it to drink; all I got.
Q. You say they sold it; you had nothing to do with it?
A. They did.
Q. Then you didn't want to get it to drink?
A. I knew I would get a part of it to drink.
Q. You said awhile ago you didn't like whiskey?
A. I don't to say like it.
Q. Why would you ride 75 miles there and back and stay up two nights—ride two nights in order to get something you didn't like?
325 A. Hampton said when he sold the whiskey he would give me some money.
Q. Did he do it?
A. No, sir.
Q. Then you went to help get the whiskey for the money that was in it?
A. He said he would give me some money, let me have money if I would go with him.
Q. Just make you a present of the money?
A. No, sir; for going.
Q. Just give you the money for going with him?
A. Yes, sir.
Q. Giving you money for helping to bring the whiskey in was he?
A. Yes, sir.
Q. How much was he to give you?
A. He never gave me any.
Q. How much was he to give you?
A. He never said.
Q. One-half of what the profits were?
A. No, sir; he was to pay Sam Manus back what money he got from him.
Q. He was to pay him back his $14.50?
A. Yes, sir.
Q. And then he was to pay for what the whiskey cost and divide the balance?
A. Yes, sir.
Q. That made you a full partner in the profits?
A. He had some money in it himself.
Q. Of course he would pay what money he borrowed from Manus, and then he would take out what money he put in, and then you and he were to divide the profits?
A. I don't know whether he aimed to give me half or not. He never said.
Q. Then you were to get paid?
A. Yes, sir.
Q. And you did have an interest in this whiskey?
A. No, sir.
Q. And you didn't go to get it for Hampton?
A. He said——
Q. You went to get it for yourself and Hampton, and he was to pay you after the whiskey was sold?

326 A. I didn't exactly go for Hampton; I went for Manus mostly.

Q. You have not said so; you have said that Hampton, after he paid Manus the money he got from him, that he was to pay you—that Hampton was to pay you?

A. I said he said he would.

Q. Then what are you talking about going for Manus if Hampton was to pay you? Why is it that set here and swear that you were going for Manus?

A. Because Manus furnished me a horse and saddle.

Q. Well, but he had nothing to do with the whiskey; the only thing you were to do was to pay him back the money you got from him. That is your testimony. You are trying to make it appear you went for Manus. You said that Hampton was to pay you?

A. He was.

Q. Then what are you talking about going for Manus for?

A. He got me to go with Hampton.

Q. Hampton was to pay you out of the profits, and yet you are trying to put it all on the dead man; you went for him, and that he carried the whiskey and all that, when it turns out now you were to have a part of the profits. Now, sir, you may as well own up to other times you went for whiskey besides that once.

A. I never went but once.

Q. How did Hampton make a living, except by whiskey?

A. He got money, I reckon, from Sam Manus.

Q. Don't you know he was peddling whiskey there?

A. No, sir; he never got it but once that I know anything about.

Q. In the three weeks that you were with him he made one trip, when you went with him. How long were you at Manus's before you went with him for whiskey?

A. I could not tell you.

Q. Were you there a week?

A. I guess I was.

Q. Were you there more than a week?

A. I don't know exactly.

327 Q. Had you done any work on the building?

A. Yes, sir.

Q. Did you finish it?

A. No, sir.

Q. Stopped work to go for the whiskey, is that right?

A. No, sir; I don't know as we stopped work to go for the whiskey.

Q. You didn't go on with the work, did you?

A. No, sir.

Q. If you were at work on the building you must have stopped work to go after it. Now, then, I want to know what became of all that whiskey; that 6 gallons?

A. There is no use asking me a half a day what became of that whiskey when I have told you.

Q. You seem to be a man of some little temper.

A. I don't like to see a man acting the fool about anything.

Q. You do not like to see the man act the fool? How old are you?

A. I have told you three times.

Q. How old are you?
A. I told you I am 19 years old.
Q. You don't like to see a gentleman acting the fool?
A. I never said anything about a gentleman.
Q. You have a great respect for gentleman. You seemed to be inclined to run things your own way?
A. When I answer anything one time I don't see what good it does to tell it over all day.
Q. Will it hurt you to tell it again?
A. It won't hurt me.
Q. You could tell it one-half of the time you are scolding me.
A. I would not like to set here all day and tell that Sam Manus and Wacoo Hampton sold the shiskey, made away with the whiskey.
Q. That is what makes you mad, to have to tell a thing twice?
A. I have told it I think three times.
Q. If it is the truth it does not hurt you to tel' it?
A. No, sir.
Q. If it is falsehood it hurts you tell it the second time?
A. No, sir.
328 Q. You do not like to commit perjury so often; is that what makes you mad?
A. No, sir.
Q. What is it that makes you mad when you are asked to repeat a thing?
A. It makes me mad to see you ask the same question so many times.
Q. I am awful glad you have not got any weapons about you; I think I am safe as long as I can keep you off. You say that Wacoo Hampton and Manus sold the whiskey; you didn't have any of it on the day this killing occured, but it was some other whiskey; is that right?
A. Yes, sir.
Q. You swear to that as being God Almighty's truth?
A. Yes, sir; to the best of my knowledge.
Q. Was Christie and Pidgeon drunk before you went over to that house that night—Annie Hitchcock's?
A. No, sir.
Q. Had they been drinking whiskey there that day?
A. There was three fellows there that day, Cherokees, that drank a pint, I believe.
Q. Who were they?
A. Will Dick, Neola Pidgeon, and Ball Christie; they pawned a pistol for a pint.
Q. How much whiskey did you take over to Annie Hitchcock's?
A. Two quarts.
Q. What did you take it for?
A. To drink and treat.
Q. Why did you want to take it over there to drink if you were selling whiskey? Why is it you wanted to take it over there if you were not drinking whiskey that day?
A. Hampton said he might strike somebody that wanted to buy it.
Q. Did you strike anybody?
A. No, sir.

Q. When you went in the house you fond Roach there?
329 A. Yes, sir.
Q. What was Roach doing?
A. He was setting there with a shotgun standing up between his legs.
Q. His gun sticking up between his legs?
A. Yes, sir.
Q. You are sure that was his gun you saw sticking up between his legs?
A. Yes, sir; I think I am.
Q. Was it loaded?
A. I reckon it was; I never examined it.
Q. Was it cocked?
A. I don't know whether it was or not.
Q. Then you say Annie Hitchcock took Roach out on the porch and talked to him?
A. Yes, sir.
Q. Did you see her take Hampton out and talk to him?
A. Yes, sir.
Q. Did you see her take Brown out and talk to him?
A. No, sir.
Q. You didn't see that?
A. No, sir.
Q. Why didn't you tell before that you saw her take Wacoo Hampton out and talk to him?
A. I did, I think.
Q. I think you didn't. Where did she take Hampton?
A. I never watched them; I 'lowed they went out on the porch.
Q. Do you know what she was talking to them about?
A. *Bo*, sir; not then I didn't.
Q. Did you afterwards?
A. Well, I guess I did.
Q. Well, when?
A. In a few minutes; I don't know exactly how long; Hampton came to me and asked me to go up the road with him.
Q. Did he tell you what he wanted?
A. I don't believe he did, then.
Q. Did you ask him?
A. I believe I asked him what he wanted to go for.
Q. What did he say?
330 A. I believe he said to knock around, or just to ride around, or something.
Q. So you went?
A. Yes, sir.
Q. Just simply because he invited you to go and knock around with him you left these women, left all that you might have a chance to knock around that night with a Winchester rifle; that is what you told me?
A. I said I carried a gun.
Q. I am not talking about carrying the gun. He just simply told you he wanted to knock around, and you went to knock around, and that is all?
A. Yes, sir.
Q. You must be fond of knocking around. You didn't know anything about going up to meet Craig or going up to kill Hitchcock?

A. No, sir; I think not; I didn't.
Q. When did you find out that Hitchcock was to be killed?
A. I never did find it out.
Q. Who fired the pistol at Waler Shirley's house?
A. Hampton.
Q. You say when you came down by the house of Judge Shirley's that your horse stopped to drink, and that Hampton went on ahead?
A. Yes, sir.
Q. Did you hear him call out to Whitehead?
A. No, sir.
Q. Did he do it?
A. He never said nothing, never told me anything about calling him out.
Q. You admit you fired one shot there now, do you?
A. Yes, sir; after I got shot in the pants.
Q. When you got down to Annie Hitchcock's why didn't you tell them you fired a shot? Why did you keep quiet about it?
A. All the rest of them there was talking.
Q. When you went over to Hamilton's why didn't you tell them about it; that you fired a shot?
331 A. Hampton was doing the talking, and I thought I would let him tell it.
Q. Did you hear Dr. Hamilton say to you, "John, have you got into this kind of a thing?"
A. I don't remember it.
Q. If he did that was an invitation for you to talk. Why did you not talk then?
A. I don't remember of him saying that. I think if he had asked me any such question I would have answered it.
Q. How many shots do you think were fired in all?
A. I think about 20.
Q. How many did Hampton fire?
A. He fired 10 or 12, I believe.
Q. He emptied his pistols, did he, both of them?
A. I think he had one or two loads in one pistol.
Q. He could not have fired 12?
A. I said 10 or 12.
Q. How many did you fire?
A. One.
Q. Why didn't you fire more than one?
A. I didn't see any use.
Q. Who did you shoot at?
A. Whitehead.
Q. Where did you hit him?
A. I don't know whether I hit him or not.
Q. Here in the forehead?
A. No, sir; I know I didn't hit him there.
Q. Was Whitehead standing between you and Roach?
A. Not exactly.
Q. Pretty nearly?
A. Some difference; wasn't exactly between us.

Q. About near enough so if you missed him you could hit Roach?
A. No, sir; I don't think I could.
Q. He was standing partially between you, was he not?
A. Not exactly; sort of to one side.
332 Q. Not exactly is near enough. Why didn't you fire more shots? You had a chance to fire. What was Whitehead doing while these other men were shooting?
A. I told you that he was shooting at me and Roach.
Q. How many shots did he fire before you shot?
A. I don't recollect, but I think it was three.
Q. Did the ball that struck your pants went through your pants and strike your leg?
A. No, sir; just did miss me.
Q. Was that the first shot that was fired?
A. That was the first one that was fired at me, I think.
Q. Was the other shooting going on at that time?
A. Yes, sir.
Q. You were excited?
A. No, sir; not much.
Q. Did you know that went through your pants?
A. I felt something jerk my pants that way.
Q. You felt a ball go through your pants that never touched your hide, in the excitement, and you felt the ball go through your pants, and it never touched your hide, and upon the strength of that you put a ball into the man. Do you mean to say that?
Mr. FREDERICK. He never said that he put a ball into the man.
The DISTRICT ATTORNEY. Is that right?
A. No, sir; I never said I put a load into him.
Q. Did you?
A. I told you I didn't know.
Q. You admit you tried to, don't you?
A. I fired one shot.
Q. At him?
A. Towards where he was at?
Q. And yet you undertake to say that during that excitement you felt the ball go through your pants that never touched you?
A. Yes, sir.
333 Q. You had eight drinks in you, and during all that excitement you felt a ball go through your pants and didn't touch your skin?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. Did you put your hands down to feel the place?
A. Not then, I didn't.
Q. You say that Zoach didn't run away there and leave you?
A. No, sir.
Q. You say that he staid right there?
A. Yes, sir.
Q. With a wound in his arm?
A. Yes, sir.
Q. Was he shot before you?

A. Yes, sir.
Q. Before your pants were shot?
A. Yes, sir.
Q. You remember that?
A. Yes, sir.
Q. You heard him say that he saw you after Whitehead was down on the ground, that he heard somebody holler, and that he turned around and saw you fire a load into him while he was lying down, after he had fallen. I reckon that is not true, is it?
A. No, sir; it is not.
Mr. FREDERICK (of counsel for defendant). Saw him fire and the blaze run all over him.
The DISTRICT ATTORNEY. Saw him fire and the blaze flashed all over him?
A. No, sir; that is not true. I will tell you what he told it for if you want to know.
Q. You can tell it.
A. To save his own life.
Q. And yet you have sworn that he never fired a shot?
A. Yes, sir.
Q. How could he swear it to save his own life when he never fired a shot? You admit that he didn't fire.
A. Yes, sir; he thinks that he will be handled for it too.
334 Q. I would not be much surprised that he was; I am not particularly favorable to any of you, as far as that is concerned. You are right there. You are not swearing to save your own life.
A. I am telling it like it was.
Q. You saw him, and you admit that he didn't fire a shot, and that he swore falsely to swear his own life, and yet you saw you are not swearing falsely to save yourself?
A. I am telling it just as near as I can, to save or not save.
Q. Of course you are not swearing to save yourself. After the shooting, why did you go back to Annie Hitchcock's?
A. That was the *the* nearest house.
Q. Why didn't you go to old man Shirley's; that was the nearest house?
A. They were all asleep.
Q. All asleep after all that shooting—20 shots fired there?
A. There was no light in the house.
Q. He was the nearest man that had a house there, a judge of the district court, and an honored citizen there?
A. I wasn't acquainted with him, or Hampton wasn't. I never like to go to anybody I am not acquainted with.
Q. It seems that would have been the place to take your wounded. So you took him to Annie's, the place from whence you had come. Did you see or hear anything of Hitchcock that night?
A. No, sir.
Q. You are certain of that?
A. Yes, sir.
Q. Did you hear Hampton tell Doctor Hamilton that he had heard of Hitchcock's coming into that country with a deputy marshal that evening?

A. No, sir; I didn't hear him tell it.

Q. Did you hear him, in your presence, tell Dr. Hamilton that he thought it was Hitchcock that he had killed?

A. No, sir; I never heard it.

335 Q. And that Hitchcock had come in that night, and that he had either heard about it or seen him. You heard Doctor Hamilton swear to that, didn't you, and that you were present when Hampton told that, and you must have heard it?

A. No, sir; I never heard it.

Q. You were with Hampton all the time you were around at Mrs. Hitchcock's house together, wasn't you?

A. Yes, sir.

Q. You say that thing wasn't said in your presence to Doctor Hamilton, that Hitchcock had come in that evening, him and a stranger? Will you say that Hampton didn't say that in your presence and in your hearing upon the night you went to Doctor Hamilton's house? Will you say that he didn't do it?

A. If he said it I never heard it.

Q. You were there?

A. Yes, sir.

Q. If he had said it you would have heard it, would you not?

A. I don't know whether I would have heard it or not.

Q. You were there listening to the conversation, were you not?

A. I wasn't listening to the conversation.

Q. You were not?

A. No, sir.

Q. What the dickens were you doing if you were not listening to the conversation when you were in the house just after you had come there from that bloody scene; if you were not listening to what was said, what were you doing?

A. When I first went in the house I kindled up a fire, or a light in the fireplace.

Q. Where were you when the talking was going on?

A. I was standing there by the fire.

Q. Wasn't you listening to what was said?

A. No, sir.

336 Q. Why not; they were talking about a matter in which you had a very deep interest?

A. He never used any such language as that in my presence that I heard.

Q. That you boys had heard of Mr. Hitchcock's coming in that evening, and that he thought maybe he was the man who was killed, he or Heck Bruner; did you see a horse standing there at Shirley's as you passed by?

A. I don't remember, but it seems like we did when we went up.

Q. You have told all that was said there at the killing between the two men—between you and the men?

A. Yes, sir.

Q How did you get it into your head that it was Bruner, the deputy marshal, that was killed?

A. I believe the first I heard of it Jim Craig came to Hamilton's the next morning, and I believe he told us.

Q. Told you it was Bruner?

A. Yes, sir.

Q. He told you it was Poorboy?

A. No, sir.

Q. Well, then, why is it that there at Mrs. Hitchcock's house, that night, when you came right from the place of the killing, not fifteen minutes afterwards, you were claiming it was Bruner?

A. I never said it was Bruner.

Q. Why was it that Hampton claimed it was Bruner?

A. I don't know.

Q. You heard him claim it?

A. It seems like I did.

Q. How did you get it into your head?

A. I don't know how he got it into his head.

Q. Because there was a strange horse there at that gate—you had heard of Hitchcock coming in there, and you knew that Bruner was a marshal—wasn't it?

A. I didn't know whether he was or not.

337 Q. Wasn't that the reason you thought it was him?

A. No, sir.

Q. How did you get it into your head it was Bruner?

A. I told you I didn't know how Hampton got it into his head it was him. I believe I heard him say something about it there at Hitchcock's.

Q. Everything is poor old Hampton, isn't it? Did you look at the men after you killed them, or did you?

A. No, sir; I never.

What was it you said about Hampton putting his hands into one of their pockets; what was it you said about that?

A. I don't remember now.

Q. You certainly said something about it.

A. I think it was somebody else.

Q. No; you are the man that said it, when Judge Frederick was asking you if you took any money from their pockets, and you said you didn't; but you said that Hampton said something about having put his hand in the pocket of the man he killed there.

A. He said something about it, but I don't remember what it was.

Q. Then you are the man that said it, are you not? I got it from you, didn't I?

A. I don't remember whether you did or not.

Q. What was it he told you about it, now? You said you staid there five minutes, and that Hampton got the gun and the pistol, and then that he said something about putting his hands into the pockets of one of them, and that Hampton told you right there about putting his hands into one of their pockets. Now what was it?

A. I believe he said he did.

Q. Into whose pocket?

A. I don't remember which one he said.

Q. Did you see him put his hand into the pockets of either one of them?

A. No, sir.

338 Q. How come him to say that he put his hand into one of their pockets?

A. I don't know; I never asked him.
Q. What was he saying that brought up the subject?
A. I don't remember now.
Q. Did he say that he found anything?
A. I don't recollect whether he ever said he found anything or not.
Q. It seems to me you ought to remember that. How long after they were killed before he told you that?
A. It must have been a week.
Q. A week afterwards? Did he take the guns from both of them?
A. Yes, sir.
Q. Came over to where you were and got Whitehead's pistol?
A. I wasn't with Whitehead. I was about as far from him as that table out there.
Q. You swear you were not close to him?
A. Yes, sir.
Q. How far were you from Poorboy?
A. I don't know exactly how far.
Q. As far from him as you were Whitehead, or further?
A. I guess I was further.
Q. These men were found ten steps apart—that is, where they were found dead?
A. I don't know how far they were apart.
Q. It was afterwards that he told you that he put his hands in one of their pockets?
A. Yes, sir.
Q. Did he say that he found anything?
A. I don't remember that he said that he found anything.
Q. How much did you get?
A. I never got anything.
Q. You heard Mr. Manus say that you exhibited three dollars there that you claimed to have gotten out of Whitehead's pocket?
339 A. He is mistaken. I didn't say that. He swore that I had a pistol that night, too.
Q. I recollect of another person who swore you had a pistol that night, too, and that is Wacoo's aunt, Mrs. Hamilton. She swore you had a pistol that night. Manus is not the only one.
A. Manus swore it was a new pistol to him.
Q. Your own witness swore to it. Manus is not the only one that swore to it. I expect he has told the truth about it.
A. Manus is swearing to another pistol.
Q. What were you doing with another pistol, and where did you get this other pistol? You didn't have the pistol when you went up to the killing, and you had one when you came away from it. How did you get it? Are you talking about Manus swearing to a different pistol from the one that Mrs. Hamilton swore to? You admit, in substance, you had one, and she testified to it.
A. I had on one of Hampton's pistols.
Q. How did you get it?
A. He let me have it.
Q. What for?
A. He had another one.

Q. What did you want with it?
A. I didn't want anything with it.
Q. Why did he let you have it?
A. Because he had enough without it.
Q. Where were you?
A. He let me have it as we went up to Hamilton's that night.
Q. What did you want with it?
A. I didn't want anything with it.
Q. Why take it?
A. He had more than he wanted.
Q. You had a gun.
A. I thought he didn't want to carry it and I would carry it.
340 Q. It seems there is somebody else that knows you had a pistol besides Manus.
A. Manus swore that I showed him a pistol that I got from Whitehead.
Q. Yes; he did.
A. It is as big a lie as ever came out of a man's mouth.
Q. This lady also swore you had a pistol when you came to her house.
A. I had one of Hampton's pistols.
Q. Why didn't you own up to it awhile ago?
A. I said I didn't have one at Manus's.
Q. When I told you there was another witness swore to it you said it was a different pistol, and when I commenced pressing you upon it you admitted you had one there, the *the* same as admitted it, and you said you didn't have one at Hamilton's, and afterwards admitted that you did. Did you have any money that night?
A. No, sir.
Q. You had no money when you left home, did you—when you left Manus's to go to Annie Hitchcock's?
A. No, sir.
Q. You had none then?
A. No, sir; I have never had as much as three dollars in money at one time since I have been in the Cherokee Nation.
Q. What is the reason you have not; were you working?
A. I didn't call for it when I left work there?
Q. Of course you could settled up there, couldn't you?
A. Yes, sir; I did settle up.
Q. The only thing you are ahead on earth is a suit of clothes, since you have been in the Indian Nation for three years past?
A. No, sir; I drawed, maybe a dollar or a half at a time, something that way, or sent for clothes.
Q. You have been running around a little too much to have much money, have you not, Brown?
A. No, sir; I don't know that I have or not.

341 ANNIE CHRISTIE, having been duly sworn, was called upon behalf of the defense, and being examined, through Interpreter Walkingstick, by Mr. C. J. Frederick, testified as follows, to wit:

Question. Ask her her name?
Answer. Annie Christie.
Q. Ask her if she is acquainted with Brown, the defendant in this case?

A. Yes, sir.

Q. Ask her if she knew Wacoo Hampton?

A. Yes, sir; she says she was acquainted with him.

Q. Ask her if sometime after the 8th of December last she saw Wacoo Hampton and Brown here at her father's, after the men were killed in December?

A. She says she could not just say when it was.

Q. Had she heard at that time that these marshals were killed at Judge Shirley's?

A. When she first heard of the killing she didn't learn it from them?

Q. I don't care about that. Ask her if at the time that Wacoo and Brown came to her father's house if she had heard at that time that these parties had been killed there at Judge Shirley's?

A. Yes, sir; she had. She had heard about the killing before she saw these boys.

Q. Ask her if she noticed whether Brown's pants looked like they had been shot or torn in the leg?

A. No, sir; she never saw any holes in his pants, but they were talking about it; she heard him talk about it; she was right close to him but she never noticed it.

342 Q. They were talking about it?

A. Yes, sir.

Q. Are you certain you understand the witness?

A. Yes, sir.

Q. Does she understand the question?

A. Yes, sir.

Q. Ask her if Brown was riding or whether he was on foot?

A. They were both walking.

Q. Ask her if she didn't notice that there was a torn or shot place or something on his pants, when they were talking?

A. No, sir; she didn't notice anything.

Cross-examination by the DISTRICT ATTORNEY:

Question. Ask her if anybody was with these two men when they came over there, or whether they were by themselves?

A. She says just them two alone.

Q. Ask her what relation she is to Ned Christie?

A. Ned is her brother.

Q. She is his sister?

A. Yes, sir.

Q. Were these men trying to get with Ned?

A. No, sir.

Q. Ned Christie is on the scout, is he not?

A. Yes, sir.

Q. How far does her father live from Ned?

A. Something over a mile.

Q. How far does she live from Judge Christie?

A. She says she does not know where Judge Shirley lives.

Q. How far does she live from Barren Fork? Does she live a good many miles from where the killing occur'ed?

A. About 6 miles, she supposes.

Q. It is further than that. How far does she live from Doctor
343 Hamilton?
A. Three miles.
Q. What direction?
A. North.
Q. How long did these men stay there?
A. Must have staid about an hour.
Q. Did they have any guns or pistols?
A. No, sir; she never noticed whether they had any guns or not. They brought one there, though, to have it fixed.
Q. Who did they want to fix it?
A. Goback Christie.
Q. He lives there does he?
A. Yes, sir.
Q. She don't know whether they had their guns or not?
A. No, sir; she never noticed.

344 JENNIE CHRISTIE, having been duly sworn, was called upon behalf of the defense, and testified as follows, to wit:

Question. Ask her if her name is Jennie Christie?
Answer. Yes, sir.
Q. Ask her what relation she is to Sam Manus?
A. Sam Manus wife is her sister.
Q. Ask her if she knows the defendant, John Brown?
A. Yes, sir.
Q. Ask her if she knew Wacoo Hampton?
A. Yes, sir.
Q. Ask her if she, at any time in December last, after the killing of Poorboy and Whitehead over there at Judge Shirley's, she saw Wacoo and Brown at her father's house?
A. Yes, sir; she saw them over there.
Q. Ask her if she noticed whether Brown had his pants torn like they had been struck with a ball and cut someway?
A. Yes, sir; she saw it.
Q. Where was it?
A. In the pants leg here.

Cross-examination by the DISTRICT ATTORNEY:

Question. Ask her how they were torn? I believe the defendant has testified these pants are in the jail over here.
A. There was one hole up in here, and then the other was down here (indicating).
345 Q. Like if the ball had gone through his leg?
A. Yes, sir.
Q. The ball must have gone through his leg, to make a hole of that kind, if it was a ball?
A. No; it was just on the edge here.
Q. What made it; could she tell anything about what made the hole?
A. No, sir; she could not tell anything about it?
Q. Was it a long tear?
A. No, sir.
Q. What kind of a one was it?

A. Just a round hole.
Q. Did she hear him say anything about it?
A. No, sir.
Q. What was he doing there?
A. They brought a gun there to have it fixed.
Q. How many did they have?
A. She never noticed.
Q. Did they have more than this one?
A. One is all she saw; just a pistol.
Q. Ask her if she didn't hear him say anything about that hole; how she came to notice it; why she looked at the holes in the young fellow's breeches?
A. She said that Wacoo Hampton told her; pointed it out to her.
Q. Wacoo is her nephew, is he?
A. Yes, sir.
Q. He is also a nephew of Annie Christie, is she not?
A. Yes, sir.
Q. Were there any men there that saw that hole?
A. Yes, sir.
Q. Are they here?
A. No, sir.

Mr. FREDERICK, of counsel for defendant). We want to offer the defendant's pants spoken of in evidence. We have sent for them to the jail. With that exception we close.

Defense rests.

346 The United States then introduced the following witnesses: Mrs. Annie Shirley, Judge Lord Wellington Shirley, Frank Hamilton, Sam Manus, Mrs. Eugenie Hamilton, Mrs. Levey Hamilton, who testified in rebuttal as follows:

347 *Testimony offered in rebuttal by the Government.*

Mrs. ANNIE SHIRLEY, having been duly sworn, was called upon behalf of the Government, and being examined by the district attorney, testified as follows, to wit:

Question. You are Judge Shirley's wife, are you not?
Answer. Yes, sir.
Q. Do you know the defendant, John Brown?
A. I never was acquainted with Brown; I never saw him but once that I know of, when he was brought there as a prisoner.
Q. You are the mother of Annie Hitchcock?
A. Yes, sir.
Q. Did you know a man named Whitehead?
A. Yes, sir.
Q. And Poorboy.
A. Well, slightly acquainted with him; I knew both of them.
Q. How long had Mr. Whitehead been at your house before he was killed?
A. I think it was 5 days.
Q. How long was Poorboy there?
A. Just the same evening the killing was done.

Q. He came the same evening?

A. Yes, sir.

Q. They went to bed in your house, I believe?

A. Yes, sir.

Q. Now, after you went to bed, I want you to tell everything that you heard, and all that took place?

A. I know very little of anything that occurred. After I went to bed I heard some person speak at the gate, some little distance from our room on the outside; spoke in a low voice, and then in a moment I heard some person say, "Tell him yes."

Q. Where was the person that said that?

A. In the bed room where they had slept.

348 Q. They were in there where Poorboy and Whitehead had gone to bed?

A. Yes, sir. I heard them when they got up and put on their clothes; that is, what they put on; they didn't put them all on. I think Whitehead didn't have on all his clothing; he didn't have on his coat or hat; and I heard them when they went out.

Q. What did you hear then?

A. After they went out I heard some person talking, and I went through that room and went to the window and tried to see out there, and I staid there awhile. I heard some person say, "Hold on, John Brown; I am a good friend to you," and I heard a voice say, "By God, we are fighters from the West," and then fired the first shot, and I didn't hear anything more that was said, and when they went off I stood there at the window until they went off from where they were at.

Q. Did you see them doing anything?

A. No, sir; it was so I could not see anything, any person.

Q. Let me see if I have got your evidence correctly: They went to bed at your house; Whitehead had been there five days, and Mr. Poorboy had just come that evening. After you went to bed some time—had you been asleep?

A. I don't think I had; I might have been asleep, but I don't hardly think I had.

Q. Then you heard somebody on the outside talking?

A. Yes, sir; I heard somebody say something, I don't remember good enough to know what it was.

Q. You were in the back room?

A. Yes, sir. Still further on from the room where they slept, the door between us locked, and a tight room.

Q. You could not tell what was said on the outside, but you heard one of the men on the inside, either Whitehead or Poorboy,

349 say, "Tell him yes?"

A. Yes, sir.

Q. You heard them get up in there and move around as if they were dressing themselves, and you heard them go out then; after they went out you heard some loud talking?

A. Yes, sir.

Q. And then you heard guns fire?

A. Yes, sir.

Q. You heard one of them say, "Hold on, John Brown, I am your friend?"

A. Yes, sir.

Q. And you heard a voice say, "By God, we are fighters from the West," and then the firing of the gun?

A. Yes, sir; that was exactly about it as near as I can tell it; I am telling the truth, I think; I was right smart excited at the time, but I think I am telling the truth; I am pretty sure I am.

Q. How old are you?

A. I think that I was 65 or 66 years old the 17th of this month.

Q. The first speaking was on the outside?

A. The first that I heard.

Q. Could you tell what was said after Poorboy and Whitehead went out?

A. I never heard them speak unless it was them talking; you know I could not see, and I just heard the talking.

Q. Did you go out there that night?

A. No, sir; I did'nt.

Q. Did your husband?

A. Yes, sir; he went out and came back again—that is, after it was done some little time. I went in the room, and I told him I believed it is them two men that was laying in the room that was killed; they have not got back and went to bed; and I told Mr. Shirley I thought it was these men that was killed, and he said he expected they was, and he said I will go out and see what I can see; and after a while he came back and said he seen two men laying out there; and I said, "It is just them boys;" and he said he expected it was, too; we didn't go out to see them until next morning.

Q. Did you go out the next morning?

A. The next morning we went out, but we did'nt go until we went for other people, and when they come there we all went out together and made a fire there.

Q. What did you find when you went out there?

A. Found two dead men laying out there and very badly shot. This man Whitehead seemed to be shot right through the neck, and a bullet hole right in his forehead and the brains oozing out, a terrible looking sight; and the other man was shot right here [indicating], and other wounds, too, but I did'nt notice, seemed to be about his nose or lip. I did'nt notice any other wounds except a wound in his pants, seemed to be cut with a bullet; they were not laying very far apart.

Q Did you see any hulls laying around there?

A. Yes, sir; I seen a few; but there was a good many people around there and picked up a great many.

Cross-examination by Mr. C. J. FREDERICK:

Q. You had gone to bed, you say?

A. Yes, sir; I had gone to bed.

Q. You don't think you had gone to sleep?

A. If I was I wasn't sound asleep; I think about the time it first commenced, I think, I must have heard it.

Q. Did you get out of bed when you heard the gun fire? Had you got out of bed before you heard the gun fire?

351 A. I don't think I did.

Q. The firing aroused you; the firing of the shots aroused you in your bed?

A. Yes, sir; I heard talking and that aroused me, and I got up and went into that room; went to the window to see, but I didn't see any person.

Q. The shooting of the guns was what aroused you?

A. Yes, sir; the talking.

Q. Did you hear the talking before you did the shooting?

A. I heard the talking, but I didn't hear much that I understood, thought; only just what I have told. I heard, "John Brown, hold on; I am a good friend to you." I heard that distinctly.

Q. Do you think you had gone to sleep, or not?

A. I don't think I had.

Q. What was it that first called your attention to anything on the outside?

A. It was the noise.

Q. What noise; the shooting?

A. Yes, sir; the shooting, fighting, and talking.

Q. I want to know if it was the shooting first attracted your attention, or the talking?

A. It seemed to be mighty night all together: I didn't hear anything distinctly, only what I have already told about the talking.

Q. You heard talking after you got up out of bed?

A. Yes, sir; I did; after I went to the window I was a good deal nearer than I was in my room.

Q. Was there any shooting after you got up out of the bed and went to the window?

A. Yes, sir; I don't know how often; there was several shots.

Q. Then they were shooting before you got out of bed?

A. I think they were. Now, I am not right positive that there was so much shooting when I roused up. I didn't say a word to Mr.

352 Shirley about it; I just got up and went to see what it was.

Q. Was the shooting still going on when you went back to bed?

A. No, sir; I staid at the window there until I heard them go off.

Q. Your husband didn't wake up until the shooting was all over?

A. I think he heard some of the shooting; he said he did, but I didn't wake him when I first got up; I went out myself and then went back in the room.

Q. When you heard him say, "Tell him yes," was that before or after the shooting?

A. Before.

Q. Was that after you went to the window?

A. No; when I heard that I was in my room yet.

Q. You had got up?

A. Yes, sir.

Q. Are you sure there was no shooting before you heard this man say, "Tell him yes?"

A. Well, I can't exactly say whethere there was or not; I was kind of frightened; I think it was pretty much about the same time.

Q. Don't you think it was the noise that waked you from the shooting?

A. I heard the noise out there; I wasn't so sound asleep but what I heard the man, whoever he was, speak at the gate, and when I heard the men get up, that kind of aroused me to see what was the matter.

Q. It was the shooting that attracted you, was it?

A. I do not know that it was particularly that; I heard the voice out there before I heard the shooting.

Q. It is not a common occurrence to have shooting around your house at night?

A. Not so common.

353 Q. It is somewhat common for people to call at the gate and talk?

A. Yes, sir.

Q. Judge Shirley being a public man, it is very common for people to come to your gate?

A. Yes, sir; it is very common.

Q. It is very common for them to come there and holler?

A. Yes, sir.

Q. You were frightened by the shooting, were you not?

A. I reckon I was a little.

Q. What time of night was this?

A. I think it was just half after nine, or near to 10 o'clock, somewhere near about there; I know the clock struck 9:00, but I don't know whether the clock is just right or not.

354 Judge L. W. SHERLY, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Q. I will ask you if you saw any empty cartridge hulls upon the outside there, where these men were killed?

A. Yes, sir; I picked up 7 myself that I could not distinguish the difference in the number between the 7 that I picked up; there was some a little larger than these, but, to tell the truth, I don't know what number any of them were.

Q. Any others there besides the 7 you picked up?

A. Yes, sir; the boys picked up some fifteen or twenty, I believe.

Q. Counting them all, would you think there was as many as 20 found there?

A. I think there was; I didn't count them, though.

Q. You think that some were larger than others?

A. Yes, sir.

355 FRANK HAMILTON, having been recalled on behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. Please state if you ever sold, or gave, or in any way let this defendant or Wacoo Hampton have any whiskey.

Mr. FREDERICK. We object to the question on the ground that it does not tend to prove or disprove the issues here. He is not charged with selling whiskey or introducing whiskey.

The COURT. I think it is competent. The defendant has charged him with violating the laws of the United States, and that that is the reason of

his testifying against him, and it may go to affect him in that way. It goes to affect his relation to the defendant, and I think it is competent.

(Defendant excepts.)

The DISTRICT ATTORNEY. Did you, about the time of this killing, or at any time, let this man or Waco Hampton, or either one of them, have any whiskey?

A. No, sir.

Q. Did you and Sam Manus have any whiskey at Annie Hitchcock's or John Roach's?

A. No, sir; we never had no whiskey.

Q. Did you take any whiskey on the day of the killing from Roach's or Hitchcock's over to Manus's, and let them have it there, or at any other place?

A. No, sir; we never let them have any whiskey anywhere.

Cross-examination by Mr. C. J. FREDERICK.

Q. You didn't have any whiskey, did you?

A. No, sir.

356 Q. You know, of course, it is a violation of the law to have whiskey in the Indian country?

A. Yes, sir.

Q. Haven't you and Sam had whiskey up there in partnership?

A. No, sir.

Q. Did you have any at John Roach's?

A. No, sir.

Q. Did Sam Manus have any there?

A. No, sir.

Q. Did you have any at Sam Manus's house?

A. Me and Sam?

Q. Yes; or you or either one of you?

A. No, sir.

Q. You never saw any there, did you?

A. No, sir.

Q. Did you ever see any whiskey at George Roach's?

A. No, sir.

Q. Did you ever see any whiskey at Annie Hitchcock's?

A. I don't remember seeing any there.

Q. You never saw any whiskey in the Indian country, did you?

A. Yes, sir.

Q. Didn't you bring some whiskey from Evansville?

A. No, sir.

Q. Did you and Sam Manus go there and get two or three gallons?

A. No, sir; I never went there with him in my life.

Q. Were you ever there?

A. Yes, sir.

357 SAM MANUS, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Please state if you let Waco Hampton or this defendant or anybody else for them have any money with which to buy whiskey, $14.50, or any other sum of money?

A. Waco Hampton got ten dollars from Mrs. Canan, her daughter, one or the other.

Q. Did you let them have any?

A. No, sir.

Q. How do you know they got it?

A. Wacoo told me about it.

Q. But you didn't see him get it?

A. No, sir.

Q. Please state if about the time of this killing you and Frank Hamilton gave Wacoo Hampton and this defendant any whiskey?

A. No, sir; I never did.

Q. Please state if you had any down there at George Roach's or John Roach's or Annie Hitchcock's, you and Frank, or either of you that you know of?

A. No, sir.

Cross-examination by Mr. C. J. FREDERICK:

Q. Do you know about when they went to Flax after that whiskey?

A. I don't know exactly the time.

Q. John Brown rode your horse, did he not?

A. No, sir; they rode a black filley that belonged to Wacoo and a pony that belonged to Wacoo's mother.

Q. That is your wife?

A. Yes, sir.

358 Q. Didn't you let them have it?

A. No, sir.

Q. How much whiskey did they bring back?

A. I don't know; they brought two or three gallons, I suppose.

Q. Didn't they bring about 6 gallons and a half?

A. I suppose it was about that much.

Q. Wacoo sold some of it, did he not?

A. I never saw him sell a drop.

Q. Brown did, did he not?

A. I never saw him.

Q. Did you drink any of it?

A. I didn't drink much of it.

Q. Wasn't it good liquor?

A. It was tolerable good.

Q. What is the reason you didn't drink it?

A. I don't drink much whiskey; I am no drunkard at all.

Q. Did they put this whiskey they brought back in your cellar?

A. No, sir; they put it in two big jugs, and I don't know where they put it.

Q. They didn't hide it out from you?

A. No, sir; they had a bottle there handy.

Q. You didn't sell any of it?

A. No, sir; you can summon the whole Cherokee Nation here, and if they swear I ever sold any whiskey I am willing to suffer the consequences.

Q. You told John not to do it, did you?

A. I told John twice, "You are a white boy, and the first thing you know you will be into trouble." A white man can not run there no time if he is peddling whiskey; he cannnot run as long as a Cherokee can; they will sort of conceal one another.

359 Mrs. EUGENIE HAMILTON, having been recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Do you know where Wacoo and the defendant got their money with which they got the whiskey?

A. They borrowed $10.00 from my sister.

Q. What is her name?

A. Mattie Randolph; I suppose that is it.

Q. Do you know whether she gave it to him, or did his granny?

A. I don't know which one gave it to him; it was her money, though.

Q. Did your granny have your sister's money?

A. It was just there in the trunk.

Q. He got ten dollars from there?

A. Yes, sir.

360 Mrs. LEVEY HAMILTON, upon being recalled by the Government, was examined by the district attorney and testified as follows, to wit:

Question. Do you know where Wacoo Hampton and this defendant got the money with which they bought the whiskey upon that occasion they went out to Flax?

A. I don't know only what Wacoo told me; he told me that he borrowed it from his grandmother—ten dollars. That is all he told me.

Cross-examination:

Q. Did he tell you anything about getting $14.50 from Sam Manus?

A. No, sir.

Q. You don't know whether he got that from him or not?

A. No, sir.

361 Mr. FREDERICK. We now desire to offer the pants of the defendant in evidence, they being the pants that were referred to by him while on the stand. (To the defendant.) These are the pants you had on?

A. Yes, sir; the holes are worn larger in the pants.

Pants are here exhibited to the jury.

Testimony closed.

362 The defendant then offered in evidence the pants the defendant wore at the time of the killing.

This was all the evidence in the case.

When the United States introduced and examined William Sullivan, whose testimony has herein been set out in full, he testified that on the morning after the killing charged in the indictment he and his stepson were passing the house of Mrs. Annie Hitchcock. The district attorney then asked the witness why he did not go in the house of Annie Hitchcock, to the asking of said question the defendant objected. The district attorney

also asked said witness whether Mrs. Annie Hitchcock forbade him to go in the house, to which question defendant objected, but the court overruled both objections and permitted the witness to answer, which answer was "She told me not to come in the house." The defendant objected to this answer on the ground that no declaration or statement nor conduct of Annie Hitchcock, an alleged conspirator with the defendant, and not indicted nor on trial, and on the day after the killing and in the absence of the defendant, was not relevant or admissable on the trial of this defendant, but the court overruled the objection and admitted the questions and answers as above stated, to which ruling of the court the defendant at the time excepted.

Whereupon after the close of the testimony and argument of the counsel the court charged the jury as follows:

363 THE UNITED STATES } Murder.
vs.
JOHN BROWN. }

Charge of the court. Delivered March 22, 1892, 2.30 p. m.

PARKER, J.

Gentlemen: The defendant is charged with having committed two murders. The first count in the indictment charges him with murder, because on the 8th day of December, 1891, in the Cherokee Nation, and in the Indian country, he wilfully and with malice aforethought took the life of Josiah Poorboy, by shooting him with a gun. The second count charges that upon the same day, in the Cherokee Nation, Indian country, that he wilfully and with malice aforethought took the life of Thomas Whitehead, by shooting him with a gun. These are laid by the Government as different accusations—as two separate offences, and it becomes your duty to pass upon both of them. In order to do that intelligently, of course you are to know what is required to be found by you to make the crime that is charges. You will understand that under the law of the United States there are but three conditions that can arise out of the taking of human life One is the state of case where the law gives the right to take life. The other is a state of case where, because of something done by the party who is killed, the taking of the life is not of that high grade of crime known as murder, and the other is a state
364 of case where the facts and circumstances show the taking of *of* a life in such away as that the law defines it as murder.

You are to ascertain in this case whether or not the last-named crime exists. You may do it by applying the doctrine of exclusion. That is to say, if you understand the other two conditions, that is, the state of case where life can rightfully be taken, and the state of case where the taking of life is mitigated, and you are able, by the light of the facts, to exclude from case these two conditions, you necessarily come to the conclusion that the other condition is the one that exists. That, in reasoning or in logic, is called the doctrine of exclusion, that is, excluding from the state of case every other proposition except the one you are hunting for. Necessarily that must be, in such a state of case where such facts exists, the truth of the case.

Now, you are to know what the law requires to be found, and you will learn this when we come to define the crime of murder. The definition will apply, of course, equally to both of these cases. That is to say, it is not necessary to repeat the definition because of there being two charges. The only difference between them in their essentials under the law is the name of the parties who were killed. Different persons are charged to have been killed. First, then, in order to make out the charge in the first count of the indictment, you are required to find that Josiah Poorboy is dead. And the same element is to be found in the second count of the indictment before you can intelligibly pass upon that charge—that is, that Thomas Whitehead is dead. You are to find, first, the fact that
365 they are dead. There is no contention over that fact. If there was, the proof is of that character that it would, in the minds of reasonable men, establish it beyond a reasonable doubt. You may safely take that proposition as established without any further investigation. The second proposition is that they died because they were shot with a gun or pistol. That is to say, they died from the effects of a gun or pistol shot. The allegation in the indictment as to the means used, is that it was a gun that was used. If the proof shows it was a pistol it is equally responsive to the allegation, because they are weapons in the law of the same kind and character. There is no contention over that proposition. There can be none in the light of the facts in this case. You may lay that aside as an essential proposition, established in this case to that extent required by the law.

The third proposition is, that these acts, or the infliction of these gun or pistol shot wounds were so done that the act or acts which resulted in the death of these two men, were wilfully done, and done with malice aforethought. Whenever you find these things existing that I have enumerated, you have found that the lives of two human beings have been taken in such a way as that two murders have been committed. That is the first general proposition to be found in every charge of the character laid against this defendant; that is, that a crime such as is charged was committed. That is in the law what is called the corpus delicti. But you can not tell yet whether that crime has been committed, although you have the facts, you have the reproduction of this occurrence as best it may be reproduced, but not by the tragic reënactment of it in your pres-
366 ence, but by a recital of these bloody and tragic facts which surround it. In that way the transaction which resulted in the death of the two men who are named in the respective counts of this indictment, their killing and the circumstances surrounding the same, are reproduced before you.

Now, you are to understand that you are to hold fast with all the tenacity your minds are capable of in the trial of cases of this character to the circumstances surrounding the transaction, because they go to characterize it, they go to tell what sort of a transaction it was. Your observation in life as men of mature years, as men of experience, not of experience in matters of this kind, but more appropriately speaking, as men of observation upon the conduct of others, enables you to name the transaction when you have the facts given you, provided you have what the law requires to make a crime. In other words, you must have what the law defines to be the crime of murder. I have given you some of the essentials of it. I

have told you in general terms that it must be a killing that is wilfully done, and done with malice aforethought. But the law does not permit me to stop there. It says that you are to receive further light upon these expressions which enter into this crime, into the fact that was done wilfully and done with malice aforethought. In other words, you must go to the law to find what definition the law attaches to these expressions, because your oath requires you to try the case by the law and the evidence. It is by the legal definition of the expressions you are to be governed in the solution of the problem.

367 We go to the law first to find what is meant by the word "wilfull," as used in connection with the charge of taking a human life. When is a human life wilfully taken? That is what we want to know, and must know right at this point. We get that, and when we are getting it we may also get the other expression, the other phrase, known as malice aforethought, because in every case where a human life is destroyed wilfully, if it is not taken under the law of self defence, or if it is not taken so that it indicates a case of manslaughter, the fact or the proof showing that it was done wilfully, shows that it was done with malice aforethought. And in that sort of a case we apply, or may apply the doctrine of exclusion, and we may exclude the other conditions, and when they are out of the case, the proof showing that the shooting was wilfully done shows that it was murder, and we need not go any further. We need not spend any further time in ascertaining the meaning of these expressions that enter into the crime. It is therefore necessary that we should get the most accurate understanding possible of the meaning of this word wilfull as applied to a case of crime. It means more than it ordinarily does. The great object of the law is the protection of innocent human life. A man who is innocent of any offence that would warrant his life being taken by another man, or by the law, is not to have it taken, and when it is taken he is deprived of the highest right that he possesses, wrongfully and wickedly. The great purpose of the law is to throw around every innocent man the fullest measure of protection that can be thrown around him. For that reason it recognizes the fact that a man may commit a wilfull act which results in death, although he did not really in-

368 tend the death. It goes that far. That is a broader comprehension than can be attached to the word as we use it ordinarily, because when we say "ordinarily" that a man wilfully does a thing, when we apply it to the every day affairs of life which do not result in the death of an innocent individual, we mean that he wills it because there is a specific purpose to accomplish a certain result. When that exists in the law, and the result is accomplished in pursuance of it, it is a case of wilfullness, but a man may take human life because of what the law regards as general malevolence, general recklessness of human life, a general disregard of the fact as to whether an innocent man possesses and enjoys life or not. When he does it that way the law says he wills it. The law in short, as you will observe presently from my reading it, says that he wills death in every case where that death is not an accidental one, where it is not the result of an accident.

Now let us see the meaning of this word wilfull. The word "wilfull" as used in connection with a charge of murder such as that which is preferred in this indictment against this defendant, means an intentional kill-

ing and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference in the law, between that which is *is* accidental, and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word "accident" is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature, and the way it is executed, as a natural and probable and reasonable result, death may ensue from the execution of the unlawful or criminal act. That which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence. When a man exercises
369 the amount of legal care exacted by the law, and something occurs beyond that that is not his wilfull act. The law recognizes that he does not do it wilfully. But, when he does an act which naturally or reasonably or probably, from its nature, and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done and it is an act that may naturally or probable *pro*duce a certain result, whenever the act is done intentionally, the result is intentional. For example if a man presents a gun at another, and fires it at him, the fact of drawing the gun and presenting it, shows that he wills what he does, shows that that act is a wilfull act upon his part. And when that state of case exists, the act of presenting and firing the gun is recognized by common observation and common experience as a wilfull act.

Why is that so? Now, we generally recognize the fact that a gun is a deadly weapon, and if it is in a condition so that a man can use it so as to take life, if it is used in a certain way it will take life, or it will jeopardize life. While that is so, it is an inanimate thing; it has no will power of itself, and therefore, common observation produces the conclusion that when a man presents it at you, or at any human being, and fires it, and death ensues as a consequence, that from the act of drawing and presenting and firing the gun, the party intended that result. That is exactly the conclusion you would come to if you would see an occurrence of that kind happen in that way, and it is exactly the conclusion you are authorized as reasonable men to come to in the jury box, when you have a case illuminated by such facts as those, and when such evidence is presented before you. You have the right simply to come to the same rational conclusion that you would come to as reasonable men if you would see a transaction of that kind with your own eyes. You haven't seen it occur; you didn't see it, but you have applied one of the other senses, you have heard how it occurred, and you have the right to come to the same conclusion in that way, just as intelligibly, just as reasonably as you would if you had witnessed the occurrence yourself.

370 If an act of this character named produces death "because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now,

intent is something that can only be found by inference. It can only be found from the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge, within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or a pistol at another and shoots it at him, the law says that he intends to kill him, because the killing is a result that is natural or probable or reasonable.

Where do you go to get a conclusion of that kind? You go to exactly what you would do as reasonable men, and what all other reasonable men do when such facts are presented, and if you would see that occur in the road or street, you would conclude that whoever was doing the shooting intended the death of the man he shot at. It is a conclusion you could not help arriving at, for the reason that we can not avoid these conclusions. You may sometimes attempt to resist them, but the truth is of such power that it will find its way to the minds of reasonable men. It will drive all prejudices, all passions out of that *that* mind, and it will produce a conclusion that is warranted by the truth, fight against it though we may.

A word in this connection as to how you may find that the act was wilfully done.

"The presumption that the law recognizes is that a man is held to have intended to natural and ordinary consequences of his act. Every sane man, who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own act. If one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from that act is that he intended so to destroy such person's life."

371 Now, shooting at a man is the doing of an act which has a direct tendency, ordinarily, to destroy his life, and the natural conclusion from the act of shooting is that he intended to destroy such person's life.

"So, if the direct tendency of the wilfull act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act.

You take the act done; now, your common observation teaches you that a gun or pistol fired at another within shooting distance of him will put his life in danger; it may probably destroy it. For that reason, because we recognize that," because that is recognized as a rational conclusion in a state of case where the party has a right to shoot because of the act of the other party shot at by him he can stand upon the defensive. We have a right in every case, for example, to take into consideration the facts and circumstances going to show the purpose of the party. If that purpose is

made manifest from the nature of the act, then the act is viewed by twelve reasonable men in the light of their observation, from the act itself and the manner it is done, the purpose to kill is established. That is one way you can find it. These are circumstances, it is true, but they are circumstances that have a direct connection with the mind, they are the direct product of that mind. The mind formulates the doing of the act before it is done; the mind knows the very things to be done that are done, and for that reason, because of the known connection, we are authorized to take the acts done and reason back to the condition of the mind. So,
372 upon that proposition in the case, if the evidence shows that Poorboy and Whitehead were killed by having a gun or pistol wilfully and intentionally presented at them and fired upon them, then their killing is a wilfull killing, and the first element of the crime of murder exists.

The other element, and the trait which distinguished murder from any other degree of homicide, is known as malice aforethought. Whenever that exists, the killing is murder, because if done with malice aforethought it was a wilfull killing. It is also true, as I have said, that a killing that is wilfully done very often is a case where malice aforethought exists. It does exist in every case where the killing is wilfull, if it be not a killing that under the law is excusable, or that is mitigated to a lower grade of crime.

Let us see what is meant by this expression, "malice aforethought:

"Malice aforethought is defined in a general way by the law to be the doing of a wrongful act without just cause or excuse, and in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it, or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief."

Let us see how the law again defines it, and how the law tells us it may be found:

"It can only be found by circumstances, like the element of wilfullness, because malice aforethought, like the other element, is something which exists in the mind, and whenever there is a thing which exists in the mind that is necessary to be found to make up the elements of the case,
373 because you can not get into the mind to know what was going on there, and you could not tell what was transpiring if you could get into it, you must learn it in some other way; and there must be some rational way by which you must learn it—some way that rational men would adopt—because you are not authorized to adopt any other methods than that which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as the proper way by which men may arrive at conclusions. It is from the nature of the transactions, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent or criminal act, and if it was a criminal act, what was the character of that criminal act."

The law again says that: "Malice aforethought is the grand criterion which distinguishes murder from other homicides, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart, a purpose to do a wicked act. And it may be either express or implied in the law. Express malice is when one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidence by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, or formed grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man wilfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proven. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, will be guilty of such an act upon a slight or upon no apparent cause."

"Malice is an intention to do bodily harm; a formed design to do mischief; it has also been defined as a deliberate attempt to kill."

A man forms a deliberate intent to kill another; that is a malicious killing. "It does not necessarily import special malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation; therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as do the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a life time pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if
374 the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces a formed design to do such mischief as may deprive a fellow being of life.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for.

"If, for instance, it becomes necessary to show that *A* shot at *B*, and *C* comes in and says that he saw *A* shoot at *B*, that is positive evidence of it, positive proof of the shooting, of the fact necessary to be found, and because the evidence is so near to the thing itself, it is called positive evidence of it; when it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances, in the shape of that which attends every transaction in life; which goes to characterize it one way or the other; which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart, by a careful study of the acts which he performs and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text-writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express.

375 "It can not be demonstrated as express.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases and by text-writers, that malice is to be inferred from the use of a deadly weapon."

That naked statement might be misleading.

"Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have a right and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought or the converse of that, in which there was an absence of that element of the crime of murder."

Anything that shows deliberation, anything that shows premeditation, a premeditated purpose to do a wicked or wilful act that might result in death, is evidence that may be considered by the jury, going to show the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the parties or party who killed, or the purpose to do a willful act that might result in death is shown by the action of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought. Therefore, there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a
376 deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party entering upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful enterprise, if it be one of that character, enabling him to consummate or carry out that enterprise, the selection of the weapon for that purpose is evidence of the existence of malice aforethought, as evidencing the existence of a purpose to do a wrongful act without just cause or excuse in such a way as to show that the party who does it has a heart void of social duty and a mind fatally bent upon mischief. That, then, is the general definition of malice. It shows the purpose to do a wrongful act without just cause or excuse, and you have given you the way you may find the existence of this element of murder. You have simply to go to the killing; you ascertain how the killing was produced, the way it transpired, the way it was done, you see what character of weapon was used, you see whether that weapon was prepared beforehand, whether it was deliberately and willfully used at the time, and in such a state of case where the evidence shows that the killing was willfully done, if there is an absence from the case of that which shows that the party had a right to so willfully kill under the law of self-defense, or that the killing was willful but that there were mitigating facts attending it, the proof which shows that it was willfully done shows that it was done wich malice aforethought, and in a case of that kind the very same degree of proof that shows a willful killing would show a killing with malice aforethought.

377 Now, that is the definition of these expressions that enter into this crime of murder that are necessary to be found—a clear portrayal of the means you may adopt to find their existence.

If you find in this case that these two men were shot to death with guns, and there was nothing under the law that I am going to give you that would justify that killing, or that would mitigate the crime, the fact that they were shot to death willfully means that there was a deliberate selection and use of a deadly weapon or weapons, of guns or pistols, and that they were used in a state of case where they could not be rightfully used under the law. From these circumstances, from that kind of a condition, as shown by the evidence, you may find, and it would be your duty to find, that the killing was murder. Now we have found, if you have found this state of case to exist in your minds, that the crime such as is charged in the indictment exists. But this does not yet enable you to fully, accurately, and correctly perform your duty. The fact that some-

body has been murdered, or two persons have been murdered, would not give you the right to proclaim the act that would lead to the punishment of anyone. There is an additional proposition that is necessary to be found, and which is, as far as this case is concerned, that this defendant was the party who, legally speaking, committed these crimes; that he was so connected with the acts, if you have found them to be crimes, that he is responsible for them under the law. Now, whenever that proposition, as the second general proposition that enters into this charge, is established to the extent that the other one must be established—that is, the corpus delicti—established beyond a reasonable doubt, then your duty is plain; it becomes your duty to say that the defendant is guilty of murder as charged.

378 Now, it is charged, not in the indictment in so many words, but by the Government upon the state of case representing this occurrence to you, that the defendant did not alone participate in this act which resulted in the death of these two men; that there was another or others besides the defendant. It becomes necessary in this connection for us to look at the law to see how a man may be a participant in an act, either by himself or jointly with another or others, becoming so connected with it as to be responsible for the crime that has been committed. In other words, how more than one person may commit the same criminal act. When more than one engages in an act that is a crime the law contemplates that underlying that act there is what is called a conspiracy. That means an agreement to do an unlawful or illegal act. That is the definition of a conspiracy, and it may be entered into in a formal way by so many words, a number of persons agreeing to do a thing that is a crime—by words, I mean, they with a knowledge of what is to be done, or what is about to be done, may join in the doing of it and then become part of the conspiracy which underlies the criminal act. For instance, in this case, if it be true that these men left the house of the women where they were for the purpose of entering *upn* upon the mission of murder by killing the man Hitchcock, if they entered into an understanding of that kind, they entered into an *an* agreement to do an act that was a criminal act and a murderous act, and if somebody was killed by mistake, under the belief it was Hitchcock, in furtherance of that common design entered into by them at that house, that would be the entering into a conspiracy to do a criminal act and to do an act that is murder. That may be entered into, I say, by so

379 many words; that may enter into it formally as they would enter into an innocent agreement, or it may be entered into by the knowledge upon the part of those who enter into it of what was to be done, and with that knowledge they go along for the purpose of assisting in doing it, then they join the conspiracy and they become parties to it. That conspiracy may exist either for a definite period before the act is done, or it may be formed and spring into existence at the very time of the doing of the act, just as intent may spring into existence when the act is done by one man or one person, may spring into existence cotemporaneous with the doing of the act. In other words, in the language of the law that I have read to you, the human mind acts with such rapidity, it can give its commands with such celerity, such swiftness, can execute them so rapidly, it may conceive a purpose to do an act, speaking as we commonly understand these things are done, cotemporaneously with the conception of the act. So a number of men may enter into a conspiracy at the very time

the act is done, which is a part of that conspiracy. A conspiracy, of course, is a secret understanding, something that is confined to those who enter upon the criminal mission. Men do not proclaim their purpose to commit a crime from the housetops that the whole world may be present to witness the crime; the purpose to do the criminal act is usually confined to the minds of those who enter upon the criminal act. It being a secret condition of mind it can only be seen by the light of circumstances, just as willfully may be discovered in that way, just as malice aforethought may be discovered by the same means. Then you are to drag it to the light of day, you are to look at it as the motive power which may
380 point to the act done, only by circumstances, such as association of the parties together, such as their being connected together at the time of the doing of the act, such as their association after the act, such as their declaration as to their participation in the act. All these things may be taken into consideration by you for the purpose of showing the existence of a conspiracy, of an unlawful understanding to commit the act that was a crime, that was an act of murder.

Now, the law tells us who are actual participants in a crime, who may be legal participants in it in such a way as to be responsible for it. It says that all those who strike in such a way as to produce a criminal result are participants in the act, and it is their act, and they are regarded as being present and as actual perpetrators of the crime, whatever it may be, if they do so participate in it as to produce the result, or do an act which has a tendency to produce the result. If it is a case where life has been taken, the act following is the act of those who have so joined in the unlawful undertaking; they are regarded as persons who are present at the place of the crime and as actual participants in it. The law says, again, that if a man, although he may not with his own hand do that which results in death to a party, if he is at the place where the death is produced, in pursuance of a common criminal understanding, for the purpose of participating in that criminal result if it should become necessary, although he does not participate in it because it is accomplished without his aid of that kind, it is his act; it is a state of case where he is regarded as being present, aiding and abetting and assisting in the commission of the crime. And the law says that he may render as-
381 sistance which contributes to the result if his presence exerts such influence upon the mind of another or others who with his or their hands commit the crime, as they are induced the more readily to do it than they would otherwise be induced to do it—in other words, they would be induced the more readily to do it than if he were absent. If the presence of the party, if the consciousness of the fact that a party having the same desire, having a common criminal mind as the one who takes the life, is present, and that exercises such influence upon him as that he strikes more quickly than he would if he was not present, the law says that is a state of case where he is actually aiding in the production of the criminal result. Then, if he is present at the place, and is there either aiding or in any way assisting, advising, counselling, or abetting the act, it is his act and it is the act of all who are so connected with it. If he is at that place for the purpose of assisting, abetting, counselling, or advising the commission of the act, though he does

not do that, it is done without his rendering any assistance, the law says that he is a participant in it, just as much as though he done it with his own hand.

Now, the law says, again, if a party is actually aiding, assisting, or abetting, though he may not be really present at the place of the crime, he is a participant in it just as much as though he was there, was actually at the place, and was doing everything that was necessary to be done to produce the criminal result. That is known as the doctrine of constructive presence, or legal presence; so near the place of the crime as to be able in some way to assist, advise, counsel, or abet it. If he is so present for the purpose of doing that, for the purpose of aiding or
382 assisting in its commission, though as a matter of fact he does not do that, because it is not necessary, as in a case of real presence when he is there for the purpose of acting if called upon to act, the law says that he is so related to the criminal act as that it is his as well as the act of all who may have participated in it.

Let us see for a moment what the law says upon these propositions:

"All persons who are present at the time of the commission of a crime are principals, although only one committed the act, provided all are proven to have confederated and engaged in a common design of which the perpetration of the crime is a part. This doctrine of criminal combination is firmly established in our criminal jurisprudence, and the cases furnish numerous illustrations. All are held responsible, because the will of each individual contributed to it; each intended that the crime should be perpetrated."

"What, in the sense of the law, is meant by being present, aiding, and abetting, is thus stated in Foster's Crown Law, that 'When the law requires the presence of the accomplice at the perpetration of the fact in order to render him a principal, it does not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise or to favor, if need be, the escape of those who are more immediately engaged. They are all—provided the fact be committed—in the eye of the law present at it, for it was made a common cause with them, each man operating in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to secure the success of their common enterprise.'"

If the confederates, at the time of the commission of the crime, were assenting to the murder, and in a situation where they might render some aid to the perpetrator, ready to give it, ready, if neccessary, to aid in the commission of the crime, they are all in the judgment of the law present aiding in the commission of the crime, though they may not as a
383 matter of fact do anything except to take themselves to that place for the purpose of assisting should they be called upon to render assistance.

"In Hess v. State, 5 Ohio, 12, the rule is thus stated: 'If several unite in one common design to do some unlawful act, and each takes the part assigned him, though all are not actually present, yet all are present in the eye of the law.'"

Again: "At common law all who were present enco'raging, aiding, and abetting, or stood ready to afford assistance, if necessary, were considered principals, either in the first or second degree." (Russ on Crimes, 25–27.)

Again: "A crime may consist of many acts which must all be committed in order to complete the offense; but each person present consenting to the commission of the offense and doing any act which is either an ingredient in the crime or immediately connected with or leading to its commission is as much a principal as if he had with *with* his own hand committed the whole offense. You could not respect the laws of your country if they punished with less severity or made any discrimination between the man who bound and held the victim and the one who gave the fatal blow—the robber who held the pistol to your breast or the one who rifled your pockets. Both are murderers, both are robbers in the eye of the law of reason and justice. No principle can be better settled or ought to be maintained with more care than this. It would be in vain to pass laws for the prevention or punishment of crimes if courts and juries were bound so to administer them as to require definite proof that a party accused committed every act necessary to bring them within the law, though it was manifest that it was the joint act of himself and associates, who took an active part in the actual perpetration; there is no such rule in our jurisprudence." United States v. Wilson, Baldw. (U. S.), 103, 104.

This gives you an idea, when a man is present, how he may be connected with the act that is criminal so as to become responsible for it. There are other principles to bear in mind in this case. When a number of men confederate together, whether that confederation has existed for a long time or a short time, whether in this case it sprung up at the house of Mrs. Annie Hitchcock, or whether it sprung up for the first time when these men were seen when they came out of the house of Shirley, a witness in this case, the place where they were shot, when that condi-
384 tion sprung into existence, all who were connected with that purpose, all who entered upon the unlawful commission of that unlawful purpose, were so united together as that the acts and words of each were the acts and words of all; therefore these acts or words were done or uttered in furtherance of a common unlawful purpose. A number of men enter upon an unlawful design; there exists a general conspiracy to act; they are bound by whatever is said or *done* in furtherance of that conspiracy as long as they continue with it, and if they continue with it up to the time of the killing, what is said or done by any one of them in furtherance of the unlawful purpose is the act and word of all, and they are bound by it in the law. They enter into this act for a wicked purpose, for a purpose forbidden by the law, and from the time of the creation of that unity which binds them together for that purpose they are regarded by the law, as far as their responsibility is concerned, as affected by that connection with the transaction as one person. Whatever may be said by one, whatever bullet may be fired by one, is fired by all. Every act that looks to the consummation of the purpose is the act of every one who has be'n acting in that common unlawful enterprise.

Now, it is necessary in a case of this kind, where more than one person is charged with a crime, although they are not upon trial, that you should look to it to see whether or not there was more than one person who participated in it, and if you find that that was the case it is highly important that you should enter into the investigation so far as to enable you to understand whether the purpose to do that act was one which was formed previous to the time it was done. If it was, every word or declaration, or every act done by the parties from the formation of this design that looked towards a consummation of it, was the act and word of each and every one. If it was formed up at the place of the shooting for the first time, if it had an existence there for the first time, then whatever was done or said by each and every one was the act and word of all who participated in it there. You will see what state of case if was that existed, as I have already said. If the purpose was to take the life of the husband of this woman, Mrs. Annie Hitchcock, and if they were instigated to do it by her, and if they entered upon that mission, they entered upon an unlawful enterprise; they entered upon the commission of a crime that could be defined by the law as nothing less than murder, and if they killed some one under the belief it was Mr. Hitchcock they were killing, that does not make it any less in its degree of crime. It would be exactly the same degree of crime as though Hitchcock had been killed. Two men or any number of men can not agree to go out and kill another innocent man, and if they kill some other man by mistake, under the belief that it is the man they started out to kill, they can not ask to be excused on that ground; it is murder, the same as though they had killed the man they started out to kill. If that was not the state of case, if no such conspiracy existed at that time, then you are to see whether or not the understanding was entered into at the place of the killing to wrongfully or illegally take the lives of these men, or to take them in such a way as to make it murder.

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Now, of course, it is your duty to see whether or not there is crime in this case, and, if so, what the character of the crime is. I am going to give you the doctrine of self-defense, not as an intimation to you that there is or is not any place to supply it in this case. You may use it by way of exclusion, as I have already told you—that it is a method you may adopt for the purpose of getting at the fact as to whether the killing was the crime of murder. The law of self-defense contemplates a state of case where the killing is done properly, where it is done legally, where it is done rightfully. It is the direct opposite of a case where murder has been committed, because that is a killing that is unlawful, that is willful, and with malice aforethought. It means, then, a state of case where, at the time of the killing, there was to the party killed, or to others he had a right to defend, existing danger to his life that he could not turn aside except by taking the life of the party or parties from whom the danger came. And under the first proposition it means a state of real, actual danger, danger of such violence, of such a threatening character that then and there had an existence as affecting the life of the defendant, and that it was necessary for him in order to save his own life, to turn it aside by killing. That, in short, is the first proposition of the law of self-defense, where there is real danger, and it implies a state of case where the party, before he can invoke it, must have been doing what he had a

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right to do. If he is upon an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if he had entered into an understanding to assist others in resisting arrest, or resisting a case of arrest that could be properly made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and he would be in the wrong, he would be entering upon a state of case that he had no
387 right to enter upon. He must be in the right before he can invoke this law of self-defense. He has no right to create the necessity for it, and then exercise force that results in death, and then say he can invoke the law of self-defense. The state of case that he can resent to the death must be br'ught on him by the wrongful act of another, without his contributing to it. He must be in the right under the law.

The other proposition is a state of case where the facts and circumstances created by another, or others, and not produced by him, by his wrongful act would lead a reasonable man to believe, from the nature of these facts and circumstances, there was danger to life, and he acts in good faith upon that condition and kills upon it. It is a state of case where there must be facts, and where there must be circumstances, where there must be that which would lead a reasonable man to believe that there was danger of life that could not be avoided except by doing as he did do, by taking life, and, like the other, is a state of case that can not spring out of the wrongful act of the party who may seek to invoke that principle of law, of self-defense, but it is a state of wrong created by the party who he slays that gave him the right to act. And that state of case can not be one that is merely imaginary, it can not be one that is a bare conception, but it must spring out of the actual facts, actual occurrences, actual things that exist, and things of the character that would so far mislead, that would mislead or misguide a reasonable man. That is the second proposition of the law of self-defense.

Now, it has been invoked by way of argument in this case that perhaps this defendant might be guilty of manslaughter. That is
388 a question for you to solve. There is one thing that you will bear in mind, however, that you are sworn to enforce the law according to the evidence in the case. You will try the case, solve the problem, by the law and by the light of the testimony. If, under the law, as shown by the evidence in the case, the crime of murder exists, you have no right to compromise with crime or compromise away the law, and these rights, and that security and protection that is secured to every man by its impartial, rigid, and fearless enforcement. It is the only way that protection can be secured. That fact has been established by the experience of the wisest and best of those who have preceded us.

I say, then, that if is there is a state of case under the law defining the crime of murder which shows that a state of murder exists, it is nothing more or less upon the part of a jury than a compromise with crime for them to find something else; it is nothing more or less than entering into a league to sustain and uphold crime, and to shield those who may have inflicted these direful consequences upon citizens of the country from the punishment that they merit under the law if it be a case of murder. I give you the law of manslaughter because it has been invoked in the case, and you are to see whether it exists; and because you may apply the doctrine of exclusion to enable you to come to the conclusion as to whether

murder exists or not, because, if self-defense does not exist, and if manslaughter does not exist, the only other condition that can exist in the case is a state of murder. Manslaughter is the willful and unlawful killing of a human being without malice aforethought, and it occupies a midway position between a state of case where the law of self-defense would apply, and a state of case where the law defining murder applys. It is a
389 midway position. It is a state of case caused by the wrongful act of the party or parties killed at the time of the killing, a wrongful act that is provocative in its character; not so provocative as to excuse the crime, but so much so as to reduce the grade of it. Now, it usually occurs when it grows out of a state of violence, when a killing occurs because of violence; where two men are engaged in an affray, in a fight, in an ordinary fisticuff or fist and skull fight, as it were, and they enter into it, and they are engaged in it without any purpose to take life, and one may get the advantage of the other, he may rain blows on his person that cause pain, and that cause the mind to be inflamed and excited, and if a party while in that condition, without any previous preparation to take life, kills, that is manslaughter. But if there is any previous preparation, if he has prepared himself with a deadly weapon, and uses it for that purpose there, that shows a deliberation, that shows premedi'ation, that shows a deliberate selection and use of a deadly weapon, and, under the law that I have read to you, that is one of the most powerful methods of ascertaining the existence of malice aforethought. But, without any preparation of that kind, without any previous purpose to take life, he suddenly, upon the spur of the moment, while that affray exists, takes life, that is manslaughter, because of the wrongful act of the party who is killed, putting his mind in a condition where the law contemplates that it acts from passion, and not from a spirit of premedi'ation or deliberation. Now, there are other cases, of course, where manslaughter would exist. When a man kills because of injury to him other than physical injury. There are some cases of that kind; there are certain great indignities that may be inflicted upon a man that are tenfold more serious in their effect upon him than
390 blows would be, that the law recognizes as of a character that may be taken into account to mitigate the crime, but they have no place in this case. I have now given you the definition of the crime of manslaughter.

It is your duty to go to the place of this killing. That is a good starting point in this case to start from, and you may travel either way. You may travel back before the killing to see what the facts and circumstances were that led up to it, how it was brought about, and in this connection it is proper to give you the rights of citizens who are not officers, ordinary citizens, in making arrests, because it has been claimed that perhaps that was the purpose of these parties who were killed when they were stopping at that house, to arrest these men. He was a refugee from justice. He had been convicted of a high crime, and he had broken prison, and he was subject to arrest at the hands of anybody. If these men went there for the purpose of arresting him they had a right to enter upon that mission. Of course it was their duty to seek to execute it in a proper way. They were to make their purpose known if possible; they were to proclaim their object if it lay in their power. Every citizen, or officer, is required to do that before he can stand upon the defensive. If the opportunity of doing

so is taken away from him by a violent act of those he is seeking to arrest, then of course he does not have to proclaim his purpose. If this defendant was traveling with Wacoo Hampton for the purpose of preventing his being arrested, prompted by a determination to resist efforts to arrest him, then he was in the wrong; he had entered upon the performance of an unlawful enterprise of a character that might result in
391 death, an enterprise that was unlawful under the law, because Wacoo Hampton had no right to resist arrest. It was his duty to submit to arrest at the hands of any officer, or any citizen, and whoever engaged in any criminal purpose to assist him in resisting that arrest had entered upon the commission of a wrongful act, of a character that if the arrest was attempted to be executed and resistance offered it might result in death; and when parties agree to enter upon a common criminal enterprise of that kind, of a kind that as a direct result of its execution death may be the consequences, and the party or parties killed who are seeking to make the arrest in a proper way of another than the defendant in this case, killed by Hampton, for example, the act of Hampton in killing was the act of this defendant, because it is an act that would naturally, reasonably, and probably grow out of resistance to the arrest, offered or agreed to be offered. Now, of course there is a distinction between a killing where there is a number of parties who go upon the enterprise, and where the killing is collateral to the enterprise—that is, a result that is not the direct and immediate consequence of the purpose entered upon, so the party who kills would be less responsible; but if naturally and reasonably from the nature of the acts agreed to be done, such as resisting arrest, if as a natural consequence death might ensue, the act of killing is the act of all, under such circumstances.

Now, I say again that these parties had a right to arrest Hampton as citizens. It was their duty to do it. It is the duty of every citizen to arrest every refugee from justice, especially one that has already been convicted of crime and who has escaped from punishment. The fact
392 of his crime has been judicially established by a jury and court, and, therefore, these men who were killed, if they went up there for the purpose of arresting Wacoo Hampton, had a right to do so. They were in the execution of a lawful purpose, and if there was a design upon the part of this defendant to assist Wacoo Hampton in resisting that arrest and in the resistance offered to it these two men were killed, the act of killing would be the act of the defendant, and the act of killing would be an act of murder upon the part of all who participated in it, of all who entered into the unlawful agreement to resist arrest and who were present at the execution of that unlawful agreement which resulted in the death of the parties. If that be the state of case there can be nothing else but murder in it. If they were called out there and shot down, under a misapprehension of who they were, or of who one of them was, that would be a state of case where there could be nothing but murder in it. If they were called out and shot down by these parties, and they all participated in it, then it was the act of all, and if there was not, in your judgment, such a state of case arising from the acts of those parties who were killed as to mitigate the killing, it is an act of murder.

Now, as I have said, you are to go to the place of the killing, and to travel either way to see what the facts were that led up to it; what were the circum-

stances that have been shown to you by the evidence, as to the purpose of these parties. And then you go to the very time of the killing. If a man kills another in self-defense his act of killing in that way is not an act usu-
393 ally that is characterized by extreme wickedness or great brutality, or great depravity, or great recklessness of purpose. It is a misfortune to him, and he so regards it, and his conduct is characterized accordingly. Therefore, it is your duty to look at the circumstances of the killing, to see whether it was characterized by facts showing brutality of purpose; showing wickedness of heart; showing great recklessness of human life. These are things that go to characterize that act, that are to be properly taken into consideration by you to show what the character of the act was, and why the killing was done. If men are wicked and reckless and their conduct shows moral depravity in the doing of an act that results in death, it will be manifested generally by the way they do that act. Therefore it is highly important you should know all the facts and circumstances immediately attending the killing. You should take into consideration all the facts and all the evidence that has gone before you throwing any light upon the manner in which the killing was done. Then afterwards you are to take into consideration the conduct of these parties, and you are to take into consideration their admissions or declarations. The admissions of a defendant are binding upon him as evidence going to show what part he took in the transaction which resulted in the death of these two men. The admission of the other party who participated in it—Hampton—made in the presence of the defendant, are competent evidence for the purpose of showing his conduct in the presence of such admissions or declarations. If statements, for example, are made by another in your presence implicating you in a crime, if you are innocent of that crime you will resent it, you will deny it, you will preserve the opinion of your neighbors in your innocence whenever you can possibly do so, because human conduct is usually that way. When testimony is offered in
394 the shape of declarations of other parties as to how the transaction occurred, if implicating another, and that other stands by and does not deny it, that is to be taken into consideration in the shape of his conduct in the presence of such declarations and admissions. Now, declarations and admissions of this defendant are necessary to be taken into account, because the testimony of Roach, who appeared before you as a witness, may, in your view of the case, be regarded as an accomplice of a man who participated in the crime, a man who, under the rules of the law I have given you, was so far connected with it as to be responsible for it. If he was with the parties in ignorance of their purpose and did not participate in any way with them he is not an accomplice. But if he knew their purpose and proceeded with them, under the law that I have given you he becomes a party to this killing, and he is then an accomplice, and it becomes necessary for you to take perhaps a different view of his evidence from what you would take of it if he was not an accomplice and if he was not so regarded by you. Therefore it is necessary that I should give you the law as to how the testimony of an accomplice is to be regarded. You will find after the law has been read to you (and it is the law that was given in another case recently tried in this court) that it is highly important in a case of that kind to look for corroborating facts; you may find these corroborating facts in the shape of admissions of the defendant and in the shape of

declarations of Hampton in his presence, or in the shape of any other accusatory facts and circumstances which go to the extent of showing his participation, identifying him as one of the parties who participated in the killing. If you take that view of the testimony, of the condition of
395 Roach, of his connection with this offense, then it would be a state of case where there would be offered by the Government the testimony of an accomplice. It goes to you in the shape of positive evidence. He was present and saw the shooting. He saw what transpired there, according to his statement—that is, all that part of it that he was competent to observe under the circumstances. That is positive evidence of the manner of the shooting—the evidence of an eye-witness to the occurrence which led to the death of these two men who are alleged to have been killed. That evidence comes before you, however, if you take the view that I have indicated of his relation to this transaction, from the mouth of what is called in the law an accomplice, a party who was a participant in the crime. Of course if he is an accomplice in the crime, there must have been a crime committed by somebody. There can not be an accomplice without a crime, and the view taken that he was an accomplice means that there was a crime committed, and a crime, too, where there was joint participation in it; where there was a state of case that showed such premeditation as that more than one man agreed to it; that a number of minds, or at least two minds, centered upon a criminal focus that was produced there by the death of these two men. The testimony of an accomplice is the testimony of a party who has participated in the crime, and who was connected with the criminal act which resulted in the death of these parties who are alleged to have been killed. The law says this evidence is competent, it goes to the jury, and is to be passed upon by them in their effort to get at the truth of the case. As to how they are to view that evidence, what credit they are to attach to it, the law points out to them; and while it
396 leaves the evidence in their hands and the weight of it to be passed upon by them, it tells them it is competent—that is, it goes to them, and the credibility of it is to be left to the jury. Touching the testimony of accomplices, Mr. Greenleaf, in his work on evidence, says:

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence, and without doubt great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges in their discretion will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration, and it is now so generally the practice to give them such advice, that its admission would be regarded as an omission of duty on the part of the judge."

Again, in a case I will quote from, the court says that—

"Witnesses have been called in the course of the trial to testify some of whom are under indictment in this court and have plead guilty to the charges presented against them. There has been much criticism of their testimony and considerable discussion of it. The court instructs you upon this subject that it is a settled rule in this country that even accomplices

are competent, and that the Government has a right to use them as witnesses, and it is the duty of the court to admit their testimony and that of the jury to consider it. The testimony of accomplices is, however, to be received with caution. The jury should not rely upon it unsupported unless it produces in their minds the most positive conviction of its truth."

That is, in a case where it is unsupported by other facts.

"It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in material respects; but this is not absolutely essential, provided the testimony of such witness produces in the mind of the jury full and complete conviction of its truth. You may believe it upon its own inherent strength, but it is always better to look for corroborating facts. As a rule juries should look for these corroborating facts.

"Now, then, the law substantially upon that proposition is that you should look through the case when the testimony of this accomplice is offered you by the Government, to see whether there are facts corroborating his evidence. And, again, it becomes necessary that you should see to what extent, or in what part of his statement, or in what part of the transaction, there are corroborating facts, because he must be corroborated as to facts that are material to the case, and by facts which show the connection, outside of
397 his evidence, of the defendant with the transaction, that identify him as a participant in that transaction that resulted in the death of the parties alleged in the indictment to have been killed. Therefore the corroboration should consist in some circumstance or circumstances that affect the identity of the accused—that show that he was a participant in the crime. The accomplice should be corroborated as to the particular person who is charged with the offense. There must be some other facts and some other circumstances which bring the crime home to the defendant which go to corroborate the statement of the accomplice. That is what is meant by corroborating his statement by some material evidence, or evidence showing a material fact in the case. That is to say, the accomplice must be corroborated as to the person of the defendant; the corroborating facts should go so far as to identify the person of the prisoner against whom the accomplice speaks. The rule requiring corroboration does not require that every fact sworn to by the accomplice shall be corroborated, but such of them or so many of them must be corroborated by facts and circumstances as to, in your judgment, give that strength that belongs to the truth alone to the testimony of the accomplice. If there is not evidence independent of the testimony of the accomplice tending to connect the defendant with the commission of the crime, then there is no corroboration of it. The sufficiency of the evidence is to be passed upon by you as jurymen; you are to weigh its sufficiency. You are to see whether or not it is corroborated in material particulars touching the identity of the defendant with the commission of this act, and if so, then it goes to strengthen the testimony of the accomplice; it puts it in the attitude where it is stronger before you than it would be coming from one who had participated in the crime and who had tainted his conscience with an act of that nature."

Now, that is a clear expression of the law requiring corroboration, to the extent it must go, and in the case where corroboration must be required by you. If he is not an accomplice then his testimony is to be received upon its inherent strength, in its own light, and in the light of the

other facts, judging it by its consistency, its reasonableness, and its probability. If he is, in your judgment, an accomplice, if he was a joint participant in that act, if you find that it was true that they were entering upon a mission of blood, if he entered upon that unlawful mission, and if these men were killed in the execution of it, then he would be an accomplice, and his testimony needs corroboration by some other facts
398 and circumstances which you may believe to be reliable, pointing to the identity of the defendant as a participant in that crime. That is the effect and substance of the law that I have given you. That corroboration may be in the shape of his own declarations as to the part that he took in this thing; it may be in the shape of any other facts and circumstances that you believe had a tendency to show that he participated in it. But if you believe that Roach occupied the position of an accomplice it is important that you should look for corroborating facts.

Now, gentlemen, I think I have given you all the principles of the law that are necessary to be given in this case. It remains, then, to call your attention to the rules of law that you are to apply in getting at the truth. You are to take into consideration, first, the nature of the facts coming from the witnesses, what they establish, provided they are true. Then, again, you are to see whether, in your judgment, they are true or not. You are to do that by seeing whether these things that are offered as truths seem to be consistent in themselves. If they are substantial truths they will be consistent, because the truth is always consistent in its material parts, in the parts of it that are relevant to the propositions that may be under investigation. That is one method of getting at the truthfulness of statements of witnesses. If a witness comes before you and asserts one particular fact that is inconsistent with another particular fact, the evidence of their inconsistency may be evidence of its being false; and on the other hand its very consistency is evidence of their truth. You are to view its consistency in its own light and in the light of other facts you find to be true, because, upon the principle I have given you, if it is true it
399 will harmonize in all its parts. In order to find, again, whether it is true or not, you are to look at it in the light of its probability, in the light of its reasonableness, in your judgment as men of experience, men of mature years, as men having reasoning powers, as men possessing honest hearts and clear minds, being prompted alone by a desire to get at the truth. If a statement by the light of your observation seems to be probable, natural, and reasonable that is one method you may adopt in passing upon the question of its truthfullness. It is a proposition, when that exists, in favor of its being true, in favor of its being worthy of belief.

In passing upon the reasonableness of the testimony and its truthfulness, you are to consider the relation that witnesses bear to the case and to the party on trial. You will bear in mind that people who are brought into court to testify to what they know by process of law are not in an attitude that, from that attitude alone, you have the right to draw an inference against their evidence, because they are performing but a simple duty. It is the duty of every man to obey the process of the law and to give his evidence in court. If they occupy relations that puts them nearer to the case than that, then you may begin to consider that relation. That proposition more especially applies to the defendant in this case than anybody else. He is the party to be the most seriously

affected by the results of this case; if you find him guilty, and guilty of these two crimes, and these crimes are found by you to be murder, he is to pay the forfeit by his life. That is the law of the land enacted for the safety of the people, deemed by the law makers necessary for their
400 safety, and it is necessary for their safety to be enforced to secure that safety. He is therefore in the attitude of one who has the highest possible interest that a man can have in this life to prompt him to present a state of case to you that you would believe favorable to him, in the light that it would benefit him, that would cause him to escape the penalties of the law, and he but possesses that characteristic of human nature that is possessed to a greater or less extent by all mankind when they are so situated that they are liable to be swayed from the truth even by a consideration of the results that may follow to them from having the jury to believe a state of case in opposition to them. You are to take that into consideration when the defendant witnesses go upon the stand—not that you are to necessarily disbelieve what they say because of that relation, but you are to weigh what they say in the light of the evidence. You are to examine it again, in the light of the other evidence. If there are facts that are true in the case, that prove anything in the case, that sustain what they say, it will strengthen their evidence. That is to say, it would be supported by such truths, and be stronger than when unsupported and coming from such witnesses. Then you view it in the light of the other facts, in the light of the other testimony. If the other testimony contradicts what he says, then his testimony is weakened by this contradiction. You are to look at the other facts, look at his testimony in the light of them. You are to find what the truth is. These two charges in the indictment are to be solved by you by your passing upon them. You are to pass upon both of them. They are separate offenses; they are independent of each other as far as the law is concerned, although they were committed almost
401 at the same time; they were done by different mechanical acts; they are separate acts of shooting which resulted in death. If it be true that these men were killed in a murderous way, killed so that their killing is murder, and that one of them was killed by the act of the defendant, directly and immediately producing a deadly injury which produced his death, then that would be his act. If the other one was killed by Hampton while he was shooting at him, and this defendant was there participating in that act, was a joint participant in it with Hampton, under the law that I have given you, that would be his act as well as the act of Hampton, and the act of killing would be the act of the defendant as well as the act of Hampton. In other words, if this is the evidence, that would be a state of case where both parties would be responsible for whatever crime was committed by the taking of the lives of these two men. It becomes necessary, therefore, that you should find separate verdicts upon each of these counts.

If you are satisfied from the whole of this testimony, viewed dispassionately, coolly, and deliberately by you as twelve honest and impartial citizens, performing your duty under the law, that the defendant is guilty beyond a reasonable doubt, and guilty of the crime of murder, your duty is to convict him of murder. If you are not satisfied to that extent your duty would be to acquit him. Now, that does not mean that these propositions which enter into the crime of murder are to be demonstrated as you

can demonstrate a problem in mathematics. It does not mean that they are to be proven absolutely. It means they are to be proven to a degree of certainty that there is banished from that conclusion all doubts for which good reasons can not be given. If so, then they are estab-
402 lished beyond a reasonable doubt; if so, they are established so that reasonable men would ordinarily believe in their truth. On the other hand, if they are not established to that extent, and are in that condition where there is a real, substantial doubt of guilt, and not a mere conjecture as to the possibility of innocence confronting your minds in the case, your duty would be to act under this condition of reasonable doubt and acquit. But that does not mean it is any kind of doubt that is to govern your minds, for if that was so you would never come to a conclusion in a jury box, because it may be successfully asserted that no proposition is ever presented to a jury that is free of all doubt; there are conjectural doubts; there are doubts based upon surmises; there are doubts that find an existence in the minds of men who are naturally doubting men; they are not reasonable doubts; they are not reasonable, real substantial doubts of guilt; they are only conjectural doubts; they are not doubts that can control the minds of reasonable men when they make up conclusions upon the important affairs of life, and that is the kind of conclusion that you are required to make up here, in a matter of as great concern as this.

If the proof in this case in the light of the law I have given you is sufficient to satisfy you, in your judgment, as reasonable citizens, of the truth of these charges you would believe them as such citizens, and your duty when such a state of case is proven is to believe them in the jury box, because you have no right to believe as citizens and disbelieve as jurors.

I submit this case to you, and ask you to do your duty, and your full duty in it.

Mr. GRACE (of counsel for the defendant). If your honor
403 please, we of course want to make our objections to the charge, and of course we will specify them more fully when the charge is written out. On one point, to make it more distinct, I will offer this (handing the court a paper).

The COURT. You can consider them as offered; I gave the law defining manslaughter.

Mr. GRACE (of counsel for defendant). We reserve our exceptions to the charge.

4:15 p. m.

404 The defendant then asked the court to charge the jury as follows: "The court instructs you on the subject of manslaughter:

"1st. Manslaughter is an unlawful and willful killing, but without malice, and is punishable by imprisonment not exceeding ten years, and fine not exceeding $1,000.00.

"2nd. If you believe from the evidence in this case that the deceased were attempting to make an illegal arrest of the defendant, and that the defendant in resisting such illegal arrest eithe' *either* by himself or in conjunction with his companions, killed the deceased, one or both, then the

attempt to illegally arrest the defendant would be such provocation as would reduce the offence to manslaughter, though the killing was done with a deadly weapon."

405 Which instruction the court refused to give, stating that the law had been fully charged. To the refusal of the court to give said instructions of the law to the jury and to the charge as given by the court to the jury the defendant at the time excepted.

The court charged the jury among other things in the charge herein set forth in full as follows:

"Conspiracy being a secret condition of mind, it can only be seen by the light of circumstances just as wilfully may be discovered in that way, just as malice aforethought may be discovered by the same means. Then you are to drag it to the light of day; you are to look at it as the motive power which may point to the act done, only by circumstances such as association of the parties together, such as their being connected together at the time of the doing of the act, such as their associations after the act, such as their declarations as to their participation in the act, all these things may be taken into consideration by you for the purpose of showing the existence of a conspiracy of an unlawful understanding to commit the act that was a crime, that was an act of murder."

To the giving of which instruction the defendant at the time excepted.

The court instructed the jury on the subject of self-defense as follows:

"If the defendant is on an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if he had entered into an understanding to assist others in resisting arrest, or resisted an arrest that

406 could be properly made, he was entering upon the commission of an act where there was a purpose to do an unlawful act and he would be in the wrong; he would be entering upon a state of case that he had no right to enter upon."

To the giving of which instructions to the jury the defendant objected on the ground that it was abstract and misleading, but the court overruled the objection and the defendant at the time excepted.

The court also charged that if this defendant was travelling with Waco Hampton for the purpose of preventing his being arrested, prompted by a determination to resist efforts to arrest him, then he was in the wrong. He had entered upon the performance of an unlawful enterprise of a character that might result in death, an enterprise that was unlawful under the law, because Waco Hampton had no right to resist arrest.

It was his duty to submit to arrest at the hands of any officer or any citizen, and whoever engaged in any criminal purpose to assist him in resisting that arrest had entered upon the commission of a wrongful act of a character that if the arrest was attempted to be executed and resistance offered it might result in death, and when parties agree to enter upon a common criminal enterprise of that kind, of a kind that as a direct result of its execution death may be the consequence, and the party or parties killed who are seeking to make the arrest in the proper way of another than the defendant in this case, killed by Hampton, for example, the act of Hampton in killing was the act of this defendant, because it is an act that would naturally, reasonably, and probably grow out of resistance to the arrest offered or agreed to be offered.

407 Now, of course there is a distinction between a killing where there is a number of parties who go upon the enterprise and where the

killing is collateral to an enterprise, that is, a result that is not the direct and immediate consequence of the purpose entered upon, so the party who kills would be less responsible; but if naturally and reasonably, from the nature of the acts agreed to be done, such as resisting arrest, if as a natural consequence death might ensue, the act of killing is the act of all, under such circumstances.

Now, I say again that these parties had a right to arrest Hampton as citizens. It was their duty to do it. It is the duty of every citizen to arrest every refugee from justice, especially one that has already been convicted of crime and who has escaped from punishment. The fact of his crime has been judicially established by a jury and court, therefore these men who were killed if they went up there for the purpose of arresting Waco Hampton had a right to do so; they were in the execution of a lawful purpose, and if there was a design upon the part of this defendant to assist Waco Hampton in resisting that arrest, and in the resistance offered to it these two men were killed, the act of killing would be the act of the defendant, and the act of killing would be an act of murder upon the part of all who participated in it, of all who entered into the unlawful agreement to resist arrest, and who were present at the execution of that unlawful agreement which resulted in the death of the parties. To the giving of which instruction the defendant objected; the court overruled the objection and to said ruling the defendant at the time excepted.

408 The court charged the jury as follows: "Now, it has been invoked, by way of argument, in this case that perhaps this defendant might be guilty of manslaughter. That is a question for you to solve. There is one thing that you will bear in mind, however, that you are sworn to enforce the law according to the evidence in the case. You will try the case, solve the problem, by the law and by the light of the testimony. If, under the law, as shown by the evidence in the case, the crime of murder exists you have no right to compromise with crime or compromise away the law and these rights and that security and protection that is secured to every man by its impartial, rigid, and fearless enforcement. It is the only way that protection can be secured. The fact has been established by the experience of the wisest and best of those who have preceeded us. I say, then, that if there is a state of case under the law defining the crime of murder which shows that a state of murder exists, it is nothing more or less, upon the part of a jury, than a compromise with crime for them to find something else; it is nothing more or less than entering into a league to sustain and uphold crime, and to shield those who may have inflicted these direful consequences upon citizens of the country from the punishment that they merit under the law, if it be a case of murder. I give you the law of manslaughter as it has been invoked in the case, and you are to see whether it exists, and because you may apply the doctrine of exclusion to enable you to come to the conclusion as to whether murder exists or not, because if self-defense does not exist, and if manslaughter does not exist, the only other condition that can exist in the case is a state of murder. Manslaughter is the wilful and unlawful killing of a human being without malice aforethought, and it occupies a midway position
409 between a state of case where the law of self-defense would apply and a state of case where the law defining murder applies. It is

a midway position. It is a state of case caused by the wrongful act of the party or parties killed at the time of the killing, a wrongful act that is provocative in its character, not so provocative as to excuse the crime, but so much so as to reduce the grade of it. Now, it usually occurs when it grows out of a state of violence, when a killing occurs because of violence, where two men are engaged in an affray, in a fight, in an ordinary fisticuff or fist and skull fight, as it were, and they enter into it and they are engaged in it without any purpose to take life, and one may get the advantage of the other, he may rain blows on his person that cause pain, and that cause the mind to be inflamed, and excited, and if a party while in that condition, without any previous preparation to take life, kills, that is manslaughter. But if there is any previous preparation, if he has prepared himself with a deadly weapon, and uses it for that purpose there, that shows deliberation, that shows premeditation, that shows a deliberate selection and use of a deadly weapon, and under the law that I have read to you that is one of the most powerful methods of ascertaining the existence of malice aforethought. But without any preparation of that kind, without any previous purpose to take life, he suddenly, on the spur of the moment, while that affray exists, takes life, that is manslaughter, because of the wrongful act of the party who is killed putting his mine in a condition where the law contemplates that it acts from passion and not from a spirit of premeditation or deliberation. Now, there are other cases, of course, where manslaughter would exist—when a man kills because of injury to him other than physical injury. There
410 are some cases of that kind; there are certain great indignities that may be inflicted upon a man that are tenfold more serious in their effect upon him than blows would be, that the law recognizes as of a character that may be taken into account to mitigate the crime, but they have no place in this case. I have now given you the definition of the crime of manslaughter." To which said instruction the defendant objected, the court overruled the objections, and to such action of the court the defendant at the time excepted.

The court further charged the jury as follows: "If you are satisfied from the whole of this testimony, viewed dispassionately, coolly and deliberately by you as twelve honest and impartial citizens, performing your duty under the law, that the defendant is guilty beyond a reasonable doubt, and guilty of the crime of murder, your duty is to convict him of murder. If you are not satisfied to that extent your duty would be to acquit him," to which portion of the charge of the court the defendant objected, the court overruled the objections, and the defendant at the time excepted to the ruling.

Whereupon the jury retired to deliberate and afterwards returned into court the following verdicts:

1st count: "We, the jury, find the defendant guilty of murder as charged in the first count of the within indictment."

H. H. DAVIS, *Foreman.*

2nd count: "We, the jury, find the defendant guilty of murder as charged in the second count of the within indictment."

H. H. DAVIS, *Foreman.*

Whereupon the defendant filed his motions for a new trial and in arrest of judgment, as follows:

411 In the circuit court of the United States for the western district of Arkansas, February term A. D. 1892.

THE UNITED STATES
vs.
JOHN BROWN. } Murder.

Comes the defendant by his attorneys and moves the court to set aside the verdict heretofore rendered against him and grant him a new trial herein, because:

1. Said verdict is contrary to the law.
2. It is contrary to the evidence, and to both law and evidence.
3. The court erred in its instructions, and in refusing instructions offered for defendant, as shown by bill of exceptions.
4. The court erred in admitting evidence to the jury, said evidence being incompetent and duly objected to by counsel for defendant, as shown by bill of exceptions.
5. The court erred in rejecting competent evidence offered on behalf of the defendant, which evidence is shown by the bill of exceptions.
6. The court erred in not requireing the prosecution to make its challenges first and pass its list to defendant to make his challenges.

Whereupon deft. prays the court to grant him a new trial.

C. J. FREDERICK, GEO. A. GRACE, *Att'y for Deft.*

412 And said defendant also moves the court to arrest the judgment on the verdict herein and discharge the defendant, because—

1. The said verdict was rendered and the said trial was partly conducted at a place not authorized by law, to wit, not at the U. S. court room, but at the county court-house.
2. The court has no jurisdiction to try the defendant at a place other than the court-house provided by law.
3. The defendant was tried on two charges at the same time, where the punishment could not be the same.
4. There was error in empaneling the jury, as to order of challenges, and therefore no jury trial and no trial by an impartial jury as guaranteed to defendant by the Constitution.

C. J. FREDERICK, GEO. A. GRACE, *Attys. for Deft.*

Filed March 25th, 1892.

Which said motions the court refused and overruled, and in overruling made the following remarks:

413 In the circuit court of the United States within and for the western district of Arkansas, February term, 1892.

UNITED STATES
vs.
JOHN BROWN. } Murder.

Ruling of court on motion for a new trial, Saturday, April 30th, 1892.

PARKER, J.:

The first cause set up for a reason why a new trial should be granted in this case is:

"Said verdict is contrary to the law."

The second ground set out is:

"It is contrary to the evidence, and to both law and evidence."

If the court regarded either of these two causes for a new trial as well taken it would set aside the verdict, but it does not so consider them. It considers that under the law and the evidence the crimes have been established.

The third ground set out is:

"The court erred in its instructions to the jury, and in refusing instructions offered for defendant, as shown by bill of exceptions, I suppose that has reference to the question of instructing upon the subject of manslaughter?"

Mr. GRACE (of counsel for defendant). Yes, sir; and illegal arrest.

414 The COURT. The court upon that considers that the instructions given were given with sufficient certainty to enable the jury to find manslaughter if they wanted to.

The fourth ground set out as a reason for a new trial is:

"The court erred in admitting evidence to the jury, said evidence being incompetent and duly objected to by counsel for defendant, as shown by the bill of exceptions."

The court is not able to say what that evidence was. It has not been called to the attention of the court, and the court is not aware of any error of that kind.

The fifth cause is:

"The court erred in rejecting competent evidence offered on behalf of defendant, which evidence is shown by the bill of exceptions."

The court makes the same statement in reference to that cause as to the fourth.

The sixth cause is:

"The court erred in not requiring the prosecution to make its challenges first and pass its list to the defendant to make his challenges."

There is one case that the court might take up time enough to read reported in the Second American Crim. Law Mag., in which this very question is very clearly decided. This question is now before the Supreme Court of the United States in the case of United States v. Alexander Lewis. The court has no grounds upon which to change its former rulings upon this subject.

415 It bases its conclusion upon the position that the right to challenge, as the word implies, is the right of objection, and not the right of selection. When the law says that a party has a right to challenge, it means that he has a right to object. In a case like this he has a right to object to 20 out of 37 qualified jurors. When he urges his objection to the 20 out of the 37, that is as far as he can go, and he can not inquire whether the Government has made any challenges or not, or whether it made all of them. It is none of his matter. He has exhausted his right. He has said that there are 20 men that he does not consent to be tried by. That right is exhausted by him when he makes 20 challenges in a case where there is no statute providing for the order of challenging. Some States have statutes upon that subject. The supreme court of Missouri, before there was any statute upon the subject, decided this question in the same way that this court has decided it. Whenever there is no statute covering the order of challenging, it is a mere rule of proceedure, within the sound discretion of the court, and it is for it to adopt a regular method or order of challenge. Subsequently the legislature of the State of Mis-

sourt passed a statute upon the subject, and, of course, where a statute exists it would be followed. There is no statute of the United States upon that subject, it being simply provided that the right of challenge exists, and to what extent it exists. I desire to say that one of the strong considerations that induced the court to adopt this method is one which I think is well sustained in the experience of every lawyer. A panel of gentlemen are brought in here from all parts of the district; they are honest and conscientious men. Under the method adopted in some courts there
416 are 12 men placed in the jury box, and the Government announces whether it desires to challenge any of them for cause, and if it does it names the man—"Mr. Smith, you will stand aside." When Mr. Smith stands aside the panel is filled up again. If the Government does not desire to make any more challenges it is passed over to the defense, and it announces its peremptory challenges, or its challenges without cause. Now, take a long term of court, such as we have here, and, while there may be no real foundation for it, sensitive men are touched by this condition, and we very often see it manifested. They get the idea that the lawyer pointed them out in the assembled crowd of people at the court, and that it is a sort of stigma upon them, and it creates more or less feeling in their minds against the man who offers the objection in that way. Before the term is half over there is probably half of the panel that are not in the best frame of mind towards the attorney who may have challenged them. Every lawyer knows this to be true. That was largely the reason that prompted this court, among other reasons, to adopt this rule. The challenges are made secret by each party, neither knowing who the other challenges, and no juror knows who challenges him, and he has no ground to have any feeling toward this lawyer or that, or against any client. It is the best method, in my judgment. It has been adopted, too, for a great many other reasons that are not necessary to be stated; but I will state this: That there were certain practices that had grown up that were reprehensible that were broken up by this method. I think the method of challenge is fair, impartial, and unbiased, for no consideration can enter into it except a desire to carry out the will of the client
417 on the part of counsel. I make this statement so that if these questions are to be passed upon by the Supreme Court it may understand why this rule has been adopted here.

The motion for a new trial will be overruled.

418 In the circuit court of the United States within and for the western district of Arkansas. February term, 1892.

UNITED STATES
vs.
JOHN BROWN. } Murder.

Ruling of court on motion to arrest judgment. Saturday, April 30th, 1892.

PARKER, J.

In this case there is a motion filed for an arrest of judgment, and it is stated therein:

"And said defendant also moved the court to arrest the judgment on the verdict herein and discharge the defendant, because

"1. The said verdict was rendered, and the said trial was partly conducted at a place not authorized by law, to wit, not at the U. S. court room, but at the county court-house."

In order that this may be understood, and a reason given why part of the trial was conducted in the county court-house instead of the U. S. court room, the court makes this statement: In the rules and regulations governing civil service examinations there is a provision which comes more in the shape of a request than anything else, that all officers of the Government, having charge of public buildings, shall offer every facility to enable the officers of the Civil Service Commission in conducting their examinations. It is a matter within the interest of the whole public that
419 these examinations should be held, and this court room was deemed the most proper place to hold the examination of the large number of ladies and gentlemen who came here. It had been advertised when and where this examination was to be held, at a time previous when we supposed that the court would be over here, but it was not, and we were in the midst of the trial of this case at the time set for the examination. After due deliberation, considering that the law when it fixed the place of holding this court named Fort Smith, Arkansas, the court conceived that it was in entire harmony with the law to go across the street to the public building of the county, where there is a large and commodious room, and proceed with this trial. This was done, and it was deemed to be no violation of the law. I do not think any authority can be found anywhere that will hold that a violation of the law has been committed in that respect. On the contrary, I understand there is a case in Tennessee that decides this very question in accordance with the view of this court.

The second cause assigned is:

"The court had no jurisdiction to try the defendant at a place other than the court-house provided by law."

The remarks made concerning the first cause assigned of course applies to this.

The third ground set out in the motion in arrest of judgment is:

"The defendant was tried on two charges at the same time where the punishment could not be the same."

I do not know exactly what is meant by that; that is, by the punishment not being the same. They were both charges of murder.
420 I think what is meant is that the defendant could not be punished for both at the same time.

Mr. GRACE (of counsel for defendant). Yes, sir.

The COURT. If that is error, it is one of which he has no right to complain. If he can not be hung but once, he has no right to complain. It seems to me that it goes to his benefit solely. I think that disposes of that cause.

The fourth ground stated in the motion for arrest of judgment is:

"There was error in empanelling the jury as to order of challenges, and therefore no jury trial, and no trial by an impartial jury, as guaranteed to defendant by the Constitution."

The court will remark that the question of the method of challenging jurors has already been passed upon in ruling on the 6th cause set out in the motion for a new trial in this case.

The motion in arrest of judgment in this case will be overruled.

Mr. GRACE (of counsel for defendant). We desire to save our exceptions to the ruling of the court upon the motion for a new trial and upon the motion in arrest of judgment.

The COURT. Yes; they are all considered saved in thise cases.

421 To the overruling of each of which motions the defendant at the time excepted.

Whereupon the court sentenced the defendant to be hanged; which sentence is as follows:

422 On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, John Brown, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 22nd day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said;

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Brown to be taken hence, and him, the said John Brown, safely and securely keep, from this date hereof until Tuesday, the 28th day June, A. D. 1892, and on that day, between the hours of 9 o'clock in the forenoon and five o'clock in the afternoon of the said day, the said marshal cause the said John Brown to be taken to some convenient place within this district, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Brown to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by the said marshal with a full and true account of the execution of the same.

423 To which judgment and sentence of the court the defendant by his counsel at the time excepted, and 30 days' time was by the court granted in which to file a petition for a writ of error and a bill of exceptions, which said bill of exceptions he here tenders and prays that the same may be signed and made a part of the record in this cause; which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge.

424 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas, May term, 1892.

UNITED STATES
vs. } Murder.
JOHN BROWN.

Defendant assigns the following errors of the court below:

1st. The court erred in not requiring the district attorney to make all his challenges to the jury before requiring the defendant to pass upon the jury.

2nd. The court erred in requiring defendant to be tried before the jury selected in the way and method mentioned in assignment No. 1.

3rd. The court erred in permitting the witness Sullivan to testify that on the morning after the killing charged in the indictment he and his stepson were passing the house of Mrs. Anna Hitchcock, and in answer to the question why he did not go in, and if Mrs. Anna Hitchcock forbade him to go in the house, that "she told me not to come in the house."

4th. The court erred in giving the following instructions to the jury: "Conspiracy being a secret condition of the mind, it can only be seen by the light of circumstances, just as wilfully may be discovered in that way, just as malice aforethought may be discovered by the same means. Then you are to drag it to the light of day, you are to look at it as the
425 motive power which may point to the act done only by circumstances, such as association of the parties together, such as the being connected together at the time of the doing of the act, such as their association after the act, such as their declaration as to their participation in the act—all these things may be taken into consideration by you for the purpose of showing the existance of a conspiracy of and unlawful understanding to commit the act that was a crime, that was an act of murder."

5th. The court erred in giving the following instructions:

"If the defendant was on an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if had entered into an understanding to assist others in resisting arrest, or resisted an arrest that co'ld properly be made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and he would be int the wrong; he would be entering upon a state of case that he had no right to enter upon."

6th. The court erred in giving the following instructions to the jury:

"If the defendant was traveling with Waco Hampton for the purpose of preventing his being arrested, prompted by a determination to resist efforts to arrest him, then he was in the wrong; he had entered upon the performance of an unlawful enterprise of a character that might result in death, an enterprise that was unlawful under the law, because Waco Hampton had no right to resist arrest. It was his duty to submit to arrest at the hand of any officer or any citizen, and whoever en-
426 gaged in criminal purpose to assist him in resisting that arrest had entered upon the execution of a wrongful act of a characted that, if the arrest was attempted to be executed and resistance offered, it might result in death; and when parties agree to enter upon a common criminal

enterprise of that kind, of the kind that as the direct result of its execution death may be the consequence, and the party of parties killed were seeking to make the arrest in the proper way, of another than the defendant in this case, killed by Hampton for example, the act of Hampton in killing was the act of this defendant, because it is an act that would naturally, reasonably, and probably grow out of the resistance to the arrest offered or agreed to be offered. Now, of course there is a distinction between a killing where there is a number of parties who go upon the enterprise, and when the killing is collateral to an enterprise. That is a result that is not direct and immediate consequence of the purpose entered upon, so the party who killed would be less responsible; but if naturally and reasonably, from the nature of the act agreed to be done, such as resisting arrest, if as a natural consequence death might ensue, the act of killing is the act of all under such circumseances. Now I say again that these parties had the right to arrest Hampton as citizens. It was their duty to do it. It is the duty of every citizen to arrest every refugee from justice, especially one who has already been convicted of a crime and who has escaped from punishment. The fact of his crime
427 has been judicially established by a jury and court, and therefore these men who were killed, if they went up there for the purpose of arresting Waco Hampton, had a right to do so. They were in the execution of a lawful purpose, and if there was a design upon the part of this defendant to assist Waco Hampton in resisting that arrest, and in the resistance offered to it theses two men were killed, the act of killing would be the act of the defendant, and the act of killing would be an act of murder upon the part of all who participated in it, of all who entered into the unlawful agreement to resist arrest, and who were present at the execution of that unlawful agreement which resulted in the death of the parties."

The court erred in giving the following instruction to jury:

7th. Now, it has been invoked by way of argument in this case that perhaps defendant might be guilty of manslaughter. That is a question for you to solve. There is one thing that you will bear in mind, however, that you are sworn to enforce the law according to the evidence in the case. You will try the case, solve the problem by the law and by the light of the testimony.

If under the law, as shown by the evidence in the case, the crime of murder exists, you have no right to compromise with crime, or compromise away the law and those rights and that security and protection that is secured to every man by its impartial, rigid, and fearless enforcement.

428 It is the *only* way that protection can be secured. That fact has been established by the experi*a*nce of the wisest and best of those who have preceded us. I say, then, that if there is a *s*tate of case under the law defining the crime of murder which shows that a state of murder exists, it is nothing more or less upon the part of a jury than a compromise with crime for them to find something else. It is nothing more or less than entering into a league to sustain and uphold crime, and to shield those who may have inflicted those direful consequences upon citizens of the community from the punishment that they merit under the law if it be a case of murder. I give you the law of manslaughter as it has been invoked

in the case, and you are to see whether it exists, and because you may apply the doctrine of exclusion to enable you to come to a conclusion whether murder exists or not; because, if self-defense does not exist, the only other condition that can exist in the case is a state of murder. Manslaughter is the wilful and unlawful killing of a human being without malice aforethought, and it occupies a midway position between a state of case where the law of self-defense would apply and a state of case where the law of defining murder applies. It is a midway position; it is a state—
429 it is a state of case caused by the wrongful act of the party or parties killed, a wrongful act that is provocative in its character; not so provocative as to excuse the crime, but so much so as to reduce the grade of it.

Now it usually occurs where it grows out of a state of violence, when a killing occurs because of violence, when two men *enter i* engage in an affray, in a fight, in an ordinary fisticuff or fist and skill fight as it were, and they enter into it to aid, they are engaged in it without any purpose to take life, and one may get the advantage of the other—he may rain blows on his person that cause pain, that cause the mind to be inflamed and excited, and if a party while in that condition, without any previous preparation to take life, kills, that is manslaughter; but if there is any previous preparation, if he has prepared himself with a deadly weapon and uses it for that purpose there, that shows deliberation, that shows premeditation, that shows the deliberate relation and use of a deadly weapon, and under the law that I have read to you that is one of the most powerful methods of ascertaining the existance of malice aforethought. But without any preparation of that kind, without any previous purpose to take life, he suddenly, on the spur of the moment, while that affray exists, takes life, that is manslaughter, because of the wrongful act of the party who is killed, putting his mind in a condition where the law contem-
430 plates that it acts from passion and not from a spirit of premeditation or deliberation. Now, there are other cases, of course, where manslaughter would exist. Where a man kills because of injury to him other than physical injury, there are some cases of that kind; there are certain great indignities that may be inflicted upon a man that are tenfold more serious in their effects upon him than blows would be that the law recognizes as of a character that may be taken into account to mitigate the crime; but they have no place in this case. I have now given you the defination of the crime of manslaughter."

8th. It was error to charge the jury as follows:

"If you are satisfied from the whole of the testimony, viewed dispassionately, cooly, and deliberately by you as twelve honest and impartial citizens performing your duty under the law, that the defendant is guilty beyond a reasonable doubt and guilty of the crime of murder, your duty is to convict him of murder. If you are not so satisfied to that extent, your duty would be to acquit him."

9th. It was error for the court to refuse to give the following instruction, which was asked for the defendant:

"The court instructs you upon the subject of manslaughter:

1. Manslaughter is an unlawful and willful killing, but without malice, and is punishable by imprisonment not exceeding ten years and fine not exceeding one thousand dollars.

431 2. If you believe from the evidence in this case that the deceased were attempting to make an illegal arrest of the defendant, and that the defendant in resisting such illegal arrest, either by himself or in conjunction with his companions, killed the deceased, one or both, then the attempt to illegally arrest the defendant would be such a provocation as would reduce the offence to manslaughter, though the killing was done with a deadly weapon."

10th. It was error for the court to adjourn the trial from the court-house provided by law and continue the trial in another building and place.

11th. It was error to overrule the motion for a new trial.

12th. It was error for the court to overrule the motion in arrest of judgment.

13th. It was error for the court to render judgment and sentence against the defendant.

Wherefore, the above stated errors considered, the said defendant prays that the judgment and sentence against him be reversed.

(Si'ned) JOHN BROWN,
By GEO. A. GRACE & C. J. FREDRICK,
His Attorneys.

432 *Petition for writ of error.*

In the circuit court of the United States for the western district of Arkansas. May term, A. D. 1892.

THE UNITED STATES } *vs.* JOHN BROWN. } Indictment for murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the February term, A. D. 1892, of this said court he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of the said circuit court in said cause, removing said cause and the record therein to the said Supreme Court, in order that the same may be there re-examined, and, if error be found, that the judgment and sentence against him therein may be reversed.

JOHN BROWN,
By GEO. A. GRACE & C. J. FREDRICK,
His Atty's.

433 UNITED STATES OF AMERICA, ss:

The President of the United States to William H. H. Clayton, esq. United States district attorney for the western dist. of Arkansas, greeting

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's

office of the circuit court of the United States for the western dist. of Arkansas, wherein John Brown is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac C. Parker, judge of the district court of the United States, this 8th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

ISAAC C. PARKER,
U. S. Dit. Judge, holding Circuit Court.

434 On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

Sworn to and subscribed the , A. D. 18 .

I hereby accept service of the within citation this 8th day of June, A. D. 1892.

WM. H. H. CLAYTON,
U. S. Dist. Attorney for the Western Dist. of Arkansas.

435 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America and John Brown a manifest error hath happened, to the great damage of the said John Brown as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.]

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western Dist. of Arkansas.

Allowed by—

19803——18

436 UNITED STATES OF AMERICA,
Western district of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the record in the case of the United States vs. John Brown, indicted for murder.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith in said district, this 8th day of June, A. D. 1892.

[SEAL.] STEPHEN WHEELER,
Clerk of the United States Circuit Court for the Western District of Ark.
By I. M. DODGE,
Deputy Clerk.

(Indorsement on cover:) Case No. 15057. Term No. 1087. John Brown, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed June 18th, 1892.

Office Supreme Court U. S.
FILED.
APR 21 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN BROWN, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 1087.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

MOTION TO ADVANCE.

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN BROWN, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 1087.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

MOTION TO ADVANCE.

This is a writ of error to a judgment of the above court, sentencing the plaintiff in error to be hanged for murder committed in the western district of Arkansas.

In accordance with section 6 of the *Act of February* 6, 1889 (25 Stat. L., 656), I respectfully move the court to advance the case upon the docket and set down the same for early hearing at the next term.

CHARLES H. ALDRICH,
Solicitor-General.

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Office Supreme Court U. S.
FILED.
OCT 16 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

JOHN BROWN, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

JOHN BROWN, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

STATEMENT.

John Brown was indicted by the Grand Jury in the United States Circuit Court for the Western District of Arkansas, February 16, 1892, which indictment charged him with murder in two counts; in the first count of the murder of Josiah Poorboy, on the 8th day of December, 1891, at the Cherokee Nation in said District, and the second count charged him with the

murder of Thomas Whitehead, at the same time and place. (*Tr. p.* 1.)

The defendant was tried and found guilty on both counts, (motion for new trial and in arrest of judgment were overruled) and on the 30th day of April, 1892, defendant was sentenced on the second count to be hanged. (*Tr. p.* 260.)

A bill of exceptions was allowed and assignment of errors filed and writ of error taken to the Supreme Court.

The facts as shown by the evidence are substantially that Thomas Whitehead came to Shirley's house on the 4th of December, 1891, and got permission to board there for a few days, for which he was to pay by doing chores about the house. He was a detective, and his object was to arrest one Jim Craig, who had been arrested for adultery with Mrs. Hitchcock, and had escaped, and for whom a small reward had been offered. Mrs. Hitchcock lived about a quarter of a mile from Mr. Shirley's, and as Craig had been first arrested there, it was supposed he would soon be found there again. Josiah Poorboy came to Shirley's on the night of the killing to aid Whitehead to arrest Craig.

On the afternoon of the 8th of December, 1891, the defendant and Wacoo Hampton started down from Sam Manus' to Annie Hitchcock's to visit the girls there, defendant riding behind Hampton on the same horse and carrying Hampton's gun. They had been drinking some, and Hampton had a small quantity of whisky with him.

On the same afternoon Annie Hitchcock had sent for John

Roach, who lived three-quarters of a mile away, to come to her house, which he did, and had been there a half-hour, when defendant and Wacoo Hampton came. Mrs. Hitchcock wanted Roach to go up to Cob Hill and tell Jim Craig to come down to her house. Wacoo agreed, by request of either Roach or Mrs. Hitchcock, to go with him, and when they started Wacoo told defendant to ride behind Roach, which he did. They proceeded about two miles to Cob Hill, going past Shirley's, where Whitehead and Poorboy were, the latter not yet gone to bed, as his horse was standing at the gate. They went to Cob Hill, but did not see Jim Craig, and after waiting a half-hour, returned on the same road, Wacoo firing off a pistol as he came along. In 75 yards of Judge Shirley's a branch crosses the road and the horse Roach and defendant were riding stopped to drink, and Wacoo paced on before them. The next they saw him he was standing at Shirley's gate calling for Whitehead. (*Tr. p.* 112.) Whitehead and Poorboy came out, both armed, and Wacoo started to ride off and they told him to stop, and he just kept riding on, and Roach and defendant rode up opposite the garden fence and stopped. Whitehead came up to them and asked if either of them was Matthew Craig, and told them to consider themselves prisoners and to dismount. (*Tr. p.* 127.) They dismounted, and Roach laid his gun down on the ground, and as he straightened up, some one, he does not know who, fired a shot which struck his arm and lodged in his side. (*Tr. pp.* 112 *to* 124.) From this point on, there is some divergence in the testimony of the only two eye-witnesses, Roach and the defendant.

Roach, a prosecuting witness, says Whitehead and Poorboy opened the gate and Wacoo rode off, and they told him to stop, and Brown and Roach on the same horse rode up opposite the garden fence, and Whitehead saw them stop and come to them and asked if either of them was Matthew Craig, and to get down and consider themselves prisoners. (*Tr. pp.* 112 *and* 127.)

Defendant got down and walked behind the horse, and Roach got down on the side next to Whitehead, which put Whitehead between Roach and Brown. Whitehead told Roach to lay down his gun, and he laid it down, and as he straightened up some one fired and hit him in the arm. He cannot say who fired. Brown, Whitehead and Wacoo were all on the same side of him. Roach ran off down the road bleeding badly. He is unable to say who fired the second or subsequent shots, though he told others immediately after, that Whitehead had shot him.

Defendant testifies that as he and Roach rode up, Whitehead and Poorboy were at the gate talking with Wacoo; that they rode past the party at the gate, and Hampton said, "hold on, boys!" and then they stopped, and Hampton rode down to them, Whitehead and Poorboy following him; that defendant asked Hampton what he wanted with these fellows, and Hampton said he just wanted to talk with Whitehead a little. Brown said, then let us go on, and they all started, and Poorboy grabbed Hampton's horse by the bridle with one hand and said, "I guess we will cabbage on you fellows!" and with the other hand pointed his Winchester gun at Hampton's head. Hampton had his pistol in his hand and said, "wait, my hands are cramped."

Poorboy did not fire at once, and Hampton threw up his pistol and began firing, and Poorboy also fired two shots and was about to fire the third, when he was shot by Hampton. At about the same time Whitehead asked Roach and defendant if either of them was Matthew Craig, (*Tr. pp.* 187 *to* 189) and told them to consider themselves prisoners and to dismount, which they did. Roach laid down his gun and as he straightened up Whitehead shot him in the arm. Defendant had set the breech of his gun on the ground, when a ball struck his pants on the thigh, cutting through them; this shot was fired by Whitehead. Defendant then fired one shot, but does not know that it hit any one. Whitehead did not fall 'till a half minute after; he had shot four shots; at the time defendant fired Whitehead was still firing his pistol. (*Tr. pp.* 189 *and* 190.)

BRIEF AND ARGUMENT.

An assignment of errors was duly filed in the Court below. (*Tr. p.* 261.)

The first and second assignments are as follows:

First. The Court erred in not requiring the District Attorney to make all his challenges to the jury before requiring the defendant to pass upon the jury.

Second. The Court erred in requiring defendant to be tried before the jury selected in the way and method mentioned in assignment No. 1.

The method of selecting the jury pursued in the case is

shown by the Record on page 3 of the Transcript, and by the bill of exceptions on pages 5 to 8. It is in all respects the same as that followed in the case of *Lewis vs. the United States.* 146 *U. S.* 370, 13 *Sup. Ct. Rep.* 136. In that case the Court says: "It is reversible error for a Federal Judge to direct secret challenges to be made from separate jury lists, each side being ignorant of the challenges the other has made."

Timely and full objections were interposed and exceptions saved to every step taken in empannelling the jury, as shown on pages 4, 7 and 8 of the Transcript. The challenges were secret, the defendant was not confronted with the jurymen, and were not taken in such detail as to justify, in any reasonable sense, the expression that they were in the defendant's presence and view. This constituted error.

Third. The third error alleged in the assignment is that the Court permitted the witness, Sullivan, to testify that on the morning after the killing he and his stepson were passing the house of Mrs. Hitchcock, and in answer to the question, why he did not go in the house, and if Mrs. Hitchcock forbade him to go in the house, that she told me not to come into the house.

This testimony was admitted on the ground that it tended to show a conspiracy, and was objected to on the ground that the acts or declarations of an alleged co-conspirator, after the conspiracy is over, or the overt act done, are not evidence against the defendant. (*Tr.* 27 *and* 28.) Mrs. Hitchcock was not on trial or indicted; the time spoken of in the conversation

admitted, was after the killing and not in pursuance of the common design.

1 *Greenleaf Ev. Sec.* 111, 14*th edition.*

Note to Spies vs. The people, 3 *Am. State Rep.* 487.

4 *Am and Eng. En. L.*, 633.

U. S. vs. Gunnell (*D. C.*) 3 *Cent. Rep.*, 764.

Fourth. The same error as above is apparent in the fourth assignment as to the charge of the court. (*See Fourth Assignment tr. P.* 261.) It is charged that association of parties after the act, and their declarations as to their participation in the act are to be taken into consideration by the jury as proof of a conspiracy.

These acts and declarations by one defendant or co-conspirator, after the completion or abandonment of the enterprise are not proof as to a conspiracy by other defendants. The charge was too broad and unguarded and misleading, at least.

Fifth. The fifth assignment is that the court erred in instructing the jury that if the defendant was on an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if he had entered into an understanding to assist others in resisting arrest, or resisted an arrest that could properly be made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and he would be in the wrong; he would be entering upon a state of case that he had no right to enter upon.

This instruction is abstract as to the defendant, and is cal-

culated to do him grievous harm. There is not a breath of evidence to show that defendant had, or thought, aught against Hitchcock; or that he had entered into an understanding to resist the arrest of Hampton or any one else.

Sixth. For the sixth assignment see pages 261 and 262 of Transcript.

This part of the charge is open to the same exception. The conspiracy which the prosecution tried to prove was to kill Whitehead and Poorboy, and they steadily denied that there was any attempt by either one of the deceased to arrest anybody, and consequently on their theory, there could be no resistance to arrest in this case.

Seventh. The seventh alleged error is in regard to the charge given by the Court on the subject of manslaughter. (*See Tr. pp.* 262 *and* 263.) This part of the charge warned the jury against compromising a case of murder into manslaughter, but said nothing of the danger of a verdict of murder on a case of manslaughter, and applied, once for all, the "doctrine of exclusion" by saying: "If self-defense does not exist, the only other condition that can exist in the case is a state of murder."

After giving some instances of this offense, none of which arose in the case, the Court says: "I have now given you the definition of the crime of manslaughter."

Eighth. In this same connection in the eighth assignment (*Tr. p.* 263) the Court instructs the jury that if they are satisfied beyond a reasonable doubt that the defendant is guilty of murder, their duty would be to convict him of murder. If not so

satisfied to that extent, their duty would be to acquit him. This leaves manslaughter entirely out of the range of possibility.

Ninth. For the purpose of supplying omissions in the charge, and of calling attention to the subject of killing in resistance to an illegal arrest, the counsel of defendant offered an instruction upon manslaughter, the refusal to give, after which, constitutes the ninth assignment of error. The instruction refused is as follows: "The Court instructs you upon the subject of manslaughter:

(1.) "Manslaughter is an unlawful and wilful killing, but without malice, and is punishable by imprisonment not exceeding ten years, and fine not exceeding one thousand dollars.

(2.) "If you believe from the evidence in this case that the deceased were trying to make an illegal arrest of the defendant, and that the defendant in resisting said illegal arrest, either by himself or in conjunction with his companions, killed the deceased, one or both, then the attempt to illegally arrest the defendant would be such a provocation as would reduce the offense to manslaughter, though the killing was done with a deadly weapon."

This instruction was refused on the ground that the law had been fully charged (*Tr. p.* 253.)

Was there any evidence to base this request to charge upon?

The evidence of John Roach, a prosecuting witness, who was present, is that Whitehead asked them if either of them was Matthew Craig and to consider themselves prisoners and to dismount and lay down their guns. (*Tr. pp.* 112 *and* 127.)

The testimony of the defendant, the only other eye-witness, is to the same effect. (*Tr. p.* 188.)

Also Judge Shirley, for the prosecution says that the business of Whitehead there was to arrest Craig. (*Tr. p.* 9.) Also, when Poorboy came to his house, he said: "There is a crowd to meet me here tonight, and we are going to look out for Jim Craig." (*Tr. p* 10.)

That the theory of the prosecution and all the evidence shows that the whole object was to arrest Craig. (*See Tr. p.* 63.)

At the same time, they had nothing against the defendant and were not looking for him. (*Tr. p.* 89.

That the instruction refused was good law. (*See* 2 *Bish. Cr. Law Sec.* 699.

Tenth. The tenth error alleged relates to the adjournment of the trial from the court house provided by law and continuing the trial at another place.

There was no emergency requiring this and it is believed that it is without authority and without precedent.

Respectfully submitted,

A. H. GARLAND,

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 26 1893
JAMES H. McKENNEY,
CLERK.

CASE No. 15057.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN BROWN, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 758.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted and convicted for the murder, on December 8, 1891, of Josiah Poorboy and Thomas Whitehead at the Cherokee Nation in the Indian Territory.

The evidence on the trial was conflicting. Plaintiff in error testified that he only fired one shot, which was in self-defense, and he did not know whether it took effect or not.

STATEMENT OF FACTS.

On the evening in question the prisoner, John Brown, arrived at a house of doubtful repute, occupied by one Mrs. Annie Hitchcock, in company with a young Indian named Wakoo Hampton. Wakoo had recently escaped from prison, or the reform school, probably the latter, having when a mere child been convicted, in company with his father, for the murder or manslaughter of an old man named Canan. He was at this time sixteen or seventeen years old, and, having escaped, was "on the scout," a local phrase meaning on the lookout for deputy marshals. Wakoo was, to some extent, engaged in the business of smuggling whisky into the Indian Territory, and was always armed and prepared to resist arrest; he was always accompanied by Brown, who had a share in the profits of the whisky, and seems to have been entirely under Wakoo's influence (pp. 15–16, 74, 91, 102, 115–116, 161, 176, 178, 183, 198, 202, 209).

The two young men were met at Mrs. Hitchcock's by one John Roach, whom she had sent for ostensibly to kill hogs. All three came armed. Mrs. Hitchcock requested them to ride some distance up the road and meet one Jim Craig, her paramour, who was also on the scout, and ask him to come down to her house. After drinking heavily the three started off, Wakoo riding one horse and Roach and Brown another, carrying their firearms. Roach had the message to deliver; Wakoo wanted to join Craig and scout with him, while Brown followed Wakoo as usual. Failing to meet Craig they turned back. On the ride Wakoo stated that he intended to killed Brown Hitchcock

(Mrs. Hitchcock's husband, who was prosecuting a divorce suit against her) if he met him (pp. 34–35, 54, 79, 109–111, 116, 185–186).

On the way back was the house of an old Indian magistrate called Judge Shirley, the father of Mrs. Hitchcock. Two deputy marshals were stopping with him in search of Jim Craig, the co-respondent in Brown Hitchcock's divorce suit, for whose apprehension a reward had been offered. These deputy marshals were Whitehead and Poorboy (pp. 64, 65, 74, 77).

According to the testimony of the main witnesses, Roach and Brown, and according to accounts they had given immediately after the homicide, Wakoo, who was riding a little ahead, stopped at Shirley's house, and called the men out. They knew that Whitehead was there, but did not know of Poorboy's presence. The men came out and Wakoo started to ride off. The men stopped Brown and Roach and asked one of them if he was not Mathew Craig, a brother of Jim Craig. They said no, and the marshals then said they would make the arrest anyhow, and ordered them off their horses. Immediately a shot was fired, which Roach at first said came from Whitehead, but afterwards said came from Brown or Wakoo. It wounded Roach. A shooting affray immediately ensued, in which the two marshals were killed and no further injury was done the scouting party, except that Brown claimed a shot through his clothes.

According to Roach, Brown deliberately put a shot into Whitehead after he was disabled and lying on the ground helpless. According to Sam Manus, Wakoo's father-in-law, both the young men admitted having killed

Poorboy after he had given up the fight and begged for mercy. Mrs. Shirley's account of the affray was slightly different. She claimed that from her bedroom, after the conversation between the men at the gate began, she heard some person say, "Hold on, John Brown, I am a good friend to you;" to which a voice replied, "By God, we are fighters from the West," followed by the first shot. (See testimony of Roach, Brown, Manus, and Mrs. Shirley.) Frank Hamilton, one of the prosecution's witnesses, testifies that Brown claimed to have killed Whitehead (p. 54).

Caywood, who was at Mrs. Hitchcock's when the party returned, reports them as having spoken of the homicide in a boastful manner (pp. 37, 42–50). Caywood, Sam Manus, and Mrs. Hitchcock testify that they gave the names of the men who were killed as Whitehead and Heck Bruner, another deputy marshal (pp. 37, 96, 167). Dr. Hamilton, a witness for defense, says they gave the names as Brown Hitchcock and Bruner (p. 140). Mrs. Hamilton says they gave the names as Whitehead and Brown Hitchcock or Bruner (p. 146). Sam Manus says Brown claimed to have killed Whitehead himself at the first shot and taken $3 from his pocket (pp. 96, 97). Most of the witnesses testify that Wakoo claimed to have killed both the marshals. Mrs. Hitchcock says that Wakoo said Brown was too slow to kill a man (p. 172). Sam Manus, however, says Wakoo said "he thought Brown was a coward, but he seen that night he was brave; that he whooped and shot" (p. 98).

About twenty hulls of cartridges were found around the spot. Poorboy's body was pierced with six wounds;

Whitehead's with three. Poorboy's horse was shot and Roach's wound made eleven in all (pp. 81–82).

The party came back to Mrs. Hitchcock's after the shooting, the others leaving Roach there. Just afterwards Jim Craig appeared, also armed. The boys went around armed together for a few days, when Heck Bruner appeared on the scene with a *posse*, killed Wakoo, and arrested Brown in bed at Sam Manus's. Brown had two guns when found, one of them in his lap, and threatened to shoot the men who arrested him. One of the guns was recognized as having been borrowed by Poorboy from one of the Shirley family just before the affray. Brown admitted on the trial that Wakoo had taken the firearms of the murdered man, and also gone into their pockets. He did not deny that Poorboy's gun had come into his own possession (pp. 12, 29, 36–38, 67–72, 74, 76, 79–80, 99, 218).

ARGUMENT.

As in the majority of the cases arising in the western district of Arkansas, the errors assigned relate mainly to the charge of the court. It is not intended to discuss in this brief whether the charge was adequate to the case or entirely fair to the prisoner. If this court had general jurisdiction to grant new trials, or even if it had jurisdiction like the New York Court of Appeals in capital cases, to notice errors not excepted to at the trial (N. Y. Laws of 1887, chap. 493, sec. 528), there might be subject for consideration. It is, however, submitted that there is no difference between the civil and criminal jurisdictions of this court in this regard. Exceptions insufficient in civil cases are insufficient in criminal cases also. The statutory

authorization to review upon "writ of error" implies all that the familiar writ of error in civil cases carries with it. If the authority in the same statute to prescribe rules and regulations authorizes the assumption of a wider jurisdiction, no such assumption has yet been made by this court (Act of February 6, 1889, c. 113, sec. 6; Act of March 3, 1891, chap. 517, sec. 5). The remedy of counsel, if a charge is abstract and misleading, as claimed in this case, is to present requests, clearly stating the law applicable to his client's case. If any proposition contained in the charge is erroneous, it is the duty of counsel to present an exception to that proposition, and to that proposition alone. The necessity for this course is not merely technical. It is not at all improbable that every such request would be granted and that every such exception would be followed by an explanation or modification of the language objected to. For like reasons an exception to a passage containing several propositions is not sufficiently definite if some of the propositions are correct.

The authorities on this subject are contained in the briefs for defendant in error in two cases submitted to this court October 19, 1893, namely, No. 822, *Hall* v. *United States*, and No. 838, *Graves* v. *United States*, to which we respectfully beg leave to refer.

I AND II.

These assignments of error relate to the mode of challenging the jury.

The record as originally certified differed very little from that in *Lewis* v. *United States* (146 U. S., 370). Had the record not been amended, error would have been

confessed. The record was, however, amended *nunc pro tunc* by the circuit court to conform to the fact. Such amendment, although made after the term, was proper under the case of *Wight, petitioner* (134 U. S., 136), and the court's power to make the record conform to the fact was not affected by the *supersedeas* incident to the writ of error. (*Hovey* v. *McDonald*, 109 U. S., 150, 157.)

The proceedings at the trial in relation to challenging the jurors, as inserted in the record by amendment and introduced here by *certiorari*, are as follows:

> The persons summoned as petit jurymen were then duly examined as to their qualifications in open court and *in the presence and view of the defendant* and his counsel; and the defendant, by himself and his counsel, was then and there given by the court the fullest opportunity to ask any and all of the jurymen, so called, any and all questions touching their qualifications, and thirty-seven of the persons summoned were thus found to be qualified to sit in this case; whereupon the court furnished the district attorney and the counsel for the defendant with lists of the persons so qualified (the names on the printed lists of persons not so qualified being stricken out by the clerk), and directed them to exercise their right of peremptory challenge by striking off said lists—the district attorney not over five names and the defendant, by himself and by his attorneys, not over twenty names, respectively, and directed that such striking off of names should be done by each separately and apart from the other (*but in the court room, the prisoner and jurymen being there present*), so that neither should know what names were struck out by the other until the challenges were completed, and directing that the *first twelve names remaining* on said lists

> of qualified jurymen not peremptorily challenged by either party should be the jury for the trial of this cause; whereupon, in the manner aforesaid, four men were challenged by the district attorney alone and nineteen men by the prisoner's counsel alone, and one man (*being the forty-sixth name on said list*) by both, and the first twelve men whose names were left unchallenged were thereupon empaneled.

The objection taken at the trial is set forth in the bill of exceptions as follows:

> And said counsel were directed and ordered by the court to make their respective challenges, each side from the lists furnished by the clerk as aforesaid, without allowing the defendant's counsel to see or be informed of the names of the jurors on said list challenged by the district attorney, to which order of the court the counsel for the defendant objected, but the court overruled said objection, to which ruling of the court the defendant at the time excepted. Whereupon the challenges of each side were made by the respective counsel and the lists of the district attorney returned to the clerk. * * * and at the same time the defendant's list * * * was returned to the clerk. * * * Whereupon the defendant renewed the objection to the order of the court requiring the challenges to be made in the way and method aforesaid, and objected to the jury so selected; but the court overruled both objections and ordered the jury so selected to be called and sworn to try the case, which was accordingly done, to all of which the defendant at the time excepted. (pp. 5–8.)

The assignments of error are as follows:

> First. The court erred in not requiring the district attorney to make all his challenges to the jury before requiring the defendant to pass upon the jury.

Second. The court erred in requiring defendant to be tried before the jury selected in the way and method mentioned in assignment No. 1. (p. 261.)

The explanation of the method adopted by the court is very forcibly given in the court's opinion upon denial of the motion for a new trial in this case, as follows:

> I desire to say that one of the strong considerations that induced the court to adopt this method is one which I think is well sustained in the experience of every lawyer. A panel of gentlemen are brought in here from all parts of the district; they are honest and conscientious men. Under the method adopted in some courts there are twelve men placed in the jury box, and the Government announces whether it desires to challenge any of them for cause, and if it does it names the man—"Mr. Smith, you will stand aside." When Mr. Smith stands aside the panel is filled up again. If the Government does not desire to make any more challenges it is passed over to the defense, and it announces its peremptory challenges, or its challenges without cause. Now, take a long term of court, such as we have here, and, while there may be no real foundation for it, sensitive men are touched by this condition, and we very often see it manifested. They get the idea that the lawyer pointed them out in the assembled crowd of people at the court, and that it is a sort of stigma upon them, and it creates more or less feeling in their minds against the man who offers the objection in that way. Before the term is half over there is probably half of the panel that are not in the best frame of mind toward the attorney who may have challenged them. Every lawyer knows this to be true. That was largely the reason that prompted this court, among other reasons, to adopt this rule. The challenges are made secret by each party, neither knowing who the other chal-

> lenges, and no juror knows who challenges him, and he has no ground to have any feeling toward this lawyer or that, or against any client. It is the best method, in my judgment. It has been adopted, too, for a great many other reasons that are not necessary to be stated; but I will state this, that there were certain practices that had grown up that were reprehensible that were broken up by this method. I think the method of challenge is fair, impartial, and unbiased, for no consideration can enter into it except a desire to carry out the will of the client on the part of counsel. I make this statement so that if these questions are to be passed upon by the Supreme Court it may understand why this rule has been adopted here (p. 258).

(A) Whatever may have been the merits of the court's method of challenging jurors, the assignments of error are not sufficient to raise the point decided in the Lewis case, or any other tenable objection.

There is no rule of practice "requiring the district attorney to make his challenges to the jury before requiring defendant to pass upon the jury." The authorities in this regard are collated in 1 Thompson on Trials, section 88, *et seq.* The order of challenging is regarded as in the discretion of the court (*Id.*, sec. 94). Usually in the case of each juror the district attorney is not called upon to decide until the prisoner's counsel has waived his right of challenge. (*Id.*, sec. 95.) The prosecution even had, at least till the statute allowing peremptory challenges, the right to "stand aside" jurors (*Id.*, sec. 49 and cases cited).

The opinion of Mr. Justice Shiras in the Lewis case, at page 379, seems to recognize that the order of challenging

is within the discretion of the court below, and that it is unnecessary to require the district attorney to challenge first. He says:

> It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes. In fact, it does not clearly appear which side made the first challenges, or that the defendant had not exhausted his challenges before the Government challenged the three jurors in question. *If it were a fact that the defendant had made his twenty challenges before the Government had challenged these three men* it is difficult to see how his rights were prejudiced by the action of the District Attorney, but we should hesitate to affirm this judgment upon a record giving us so little information as to the history of the trial in these respects.

If he has his twenty statutory challenges, and proper rulings are made upon his challenges for cause, that is all that the prisoner can ask. The right of peremptory challenge is not of itself a right to select but a right to reject jurors. (*United States* v. *Marchant*, 12 Wheat., 480, 482; *Hayes* v. *Missouri*, 120 U. S., 68, 71.)

An exception based upon one specific objection waives all objections not specified. (*Evanston* v. *Gunn*, 99 U. S., 660, 665, and cases cited; *Belk* v. *Meagher*, 104 U. S., 279, 289.) Rule 35 of this court requires that an assignment of errors "shall set out separately and particularly each error asserted and intended to be urged." It is respectfully submitted that the rule of waiver applicable to exceptions hastily taken in the stress of the trial applies with even greater force to assignments of error carefully and deliberately drawn up after the trial is over.

By the same rule "the court at its option may notice an error not assigned." It is submitted, however, that as no harm can possibly have come to the prisoner from the method adopted, while, on the other hand, the practice as explained by Judge Parker in the passage above quoted, is beneficial to the prisoner, the court should not notice any objection not assigned, even if it should regard the objection as based on a technical error.

(B) The proceedings in this case are not subject to the criticism made by the court upon the record in the Lewis case. The precise point of the decision in the Lewis case we understand to be based upon the following facts (pp. 375–376):

> *And the record does not disclose that at the time the challenges were made the jury had been called into the box; nor that they or the prisoner were present at the time the challenges were made.* It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that, when the jury answered to said call, they were present so that they could be inspected by the prisoner; and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that *the prisoner was not brought face to face with the jury until after the challenges had been made, and the selected jurors were brought into the box to be sworn.* Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the sub-

> stantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The reason why the prisoner's presence is required is stated by the court as follows (p. 373), quoting from *Hopt* v. *Utah* (110 U. S., 574):

> The prisoner is entitled to an impartial jury, composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors.

In the case at bar it now affirmatively appears from the record that the defendant, as well as his counsel, was present on the examination of all the persons summoned as petit jurymen, which preceded the peremptory challenging. The prisoner remained present in the room with the jurymen during the peremptory challenging. His counsel had all the aid which the prisoner could possibly give by his personal presence in the selection of jurors. No further aid could have been given if the peremptory challenging had been done orally instead of in writing.

(C) There is nothing in these proceedings that can possibly harm defendant. If the challenges had been in the ordinary manner, each qualified juryman having been presented first to defendant's counsel and afterwards to the district attorney for challenging, the result would

have been precisely the same; the prisoner's counsel would not have known, until after his own decision, what the district attorney was going to do.

In fact, the district attorney and prisoner's counsel did not happen to challenge the same juror until the forty-sixth name in the list was reached, namely, Henry Routsel, one of the alternates. Among the twenty-five jurors whose names preceded those of the alternates, and who were not disqualified (the names of those disqualified being stricken out in red ink, as will be seen by inspection of the lists on pages 5 to 7), the defendant challenged eleven (marked D in the record) and the district attorney challenged two (marked G in the record). This left precisely twelve men, who were impaneled as the jury in the cause, and the accident of the joint challenging of Routsel cuts no figure in the case.

(D) It is respectfully submitted that the practice adopted, as made clear by amendment of the record and ably defended by the learned judge, is not only lawful but laudable.

III.

The next assignment of error, which is the only one relating to questions of evidence, seems to us unnecessary to discuss. The court is alleged to have "erred in permitting the witness Sullivan to testify that on the morning after the killing charged in the indictment he and his stepson were passing the house of Mrs. Anna Hitchcock, and in answer to the question why he did not go in, and if Mrs. Anna Hitchcock forbade him to go in the house, that 'she told me not to come in the house."' (p. 261.)

The evidence admitted amounted simply to this: Sullivan, a witness who had no connection with any of the transactions, except that he found the bodies of the two men in the road, testified that after finding the bodies, which he did not examine at all, he rode up past Annie Hitchcock's place. On passing her house she came out on the porch and spoke to his stepson. Witness thought she spoke to him, and asked what she wanted. She said: "I don't want you; I want George." She was well acquainted with the latter. Witness also accordingly stopped and held George's horse until the latter came out, when they rode off together. Mrs. Hitchcock said she would rather he would not go into the house, or something to that effect; but witness evinced no desire to go in when he found that he was not the person she wanted. George stayed in there from three to five minutes, and then came out and they rode off. That was all there was to it. (pp. 26–28, 31–32.)

IV.

This was an exception, ground unspecified, to the following passage in the charge relating to conspiracy:

> It being a secret condition of mind, it can only be seen by the light of circumstances, just as willfully may be discovered in that way, just as malice aforethought may be discovered by the same means. Then you are to drag it to the light of day, you are to look at it as the motive power which may point to the act done, only by circumstances, such as association of the parties together, such as their being connected together at the time of the doing of the act, such as their association after the act, such as their declaration as to their participation in the act. All these

> things may be taken into consideration by you for the purpose of showing the existence of a conspiracy, of an unlawful understanding to commit the act that was a crime, that was an act of murder. (p. 240.)

Had the exception alleged as its ground that there was no evidence of a homicidal conspiracy affecting the defendant in this case, and had the charge not been thereupon modified, there might have been some question for discussion here.

The court seems to have alluded to a supposed conspiracy to murder Hitchcock at request of his wife, a theory which had been announced by the district attorney early in the case (p. 27). The only evidence of such a conspiracy was that Brown accompanied Wakoo without any assigned reason, except that he always followed Wakoo; that Wakoo and Roach were in secret consultation with Mrs. Hitchcock before the three went off on the expedition to meet Craig; that Wakoo during the ride said that "if they met Brown Hitchcock anywhere on the road they would kill him," while "talking and joking;" and that he stopped at Hitchcock's father-in-law's house, called out the men sleeping there, and (Hitchcock not proving to be one of them) rode off again. The Hamiltons, indeed, swore that the boys afterwards claimed to have killed Hitchcock, but the prosecution's witnesses are agreed that the persons killed were supposed to have been Whitehead with Bruner, or some other marshal.

Whether or not this evidence was sufficient to charge defendant with a deliberate conspiracy to kill Hitchcock, its sufficiency for that purpose seems to have been assumed by counsel as well as the court on the trial. Shortly

before the passage here excepted to, the court had made the following statement, to which no exception had been taken:

> For instance, in this case, if it be true that these men left the house of the woman where they were for the purpose of entering upon the mission of murder by killing the man Hitchcock, if they entered into an understanding of that kind, they entered into an agreement to do an act that was a criminal act and a murderous act, and if somebody was killed by mistake, under the belief it was Hitchcock, in furtherance of that common design entered into by them at that house, that would be the entering into a conspiracy to do a criminal act and to do an act that is murder (p. 239).

Shortly afterwards in the charge again the court returned to the same subject, and no exception was taken:

> If the purpose was to take the life of the husband of this woman, Mrs. Annie Hitchcock, and if they were instigated to do it by her, and if they entered upon that mission, they entered upon an unlawful enterprise; they entered upon the commission of a crime that could be defined by the law as nothing less than murder, and if they killed someone under the belief it was Mr. Hitchcock they were killing, that does not make it any less in its degree of crime. It would be exactly the same degree of crime as though Hitchcock had been killed (p. 243).

The court, moreover, assumes as one possible theory a conspiracy suddenly springing up when the deputy marshals were seen coming out of Shirley's house.

> When a number of men confederate together, whether that confederation has existed for a long time

> or a short time, whether in this case it sprang up at the house of Mrs. Annie Hitchcock, or whether it sprung up for the first time when these men were seen when they came out of the house of Shirley, a witness in this case, the place where they were shot, when that condition sprung into existence, all who were connected with that purpose, all who entered upon the unlawful commission of that unlawful purpose, were so united together as that the acts and words of each were the acts and words of all; therefore, these acts or words were done or uttered in furtherance of a common unlawful purpose (p. 242).

To this assumption, also, no exception was taken. It being, therefore, assumed that the evidence is sufficient to allow the jury to infer a conspiracy between defendant and Wakoo, no objection can be taken to the discussion by the court of the legal principles governing conspiracies and the duties of jurymen in that regard.

V.

The following passage from the charge was excepted to as "abstract and misleading" (p. 253):

> If he is upon an unlawful mission, if he had entered into an understanding to kill Hitchcock, or if he had entered into an understanding to assist others in resisting arrest, or resisting a case of arrest that could be properly made, he was entering upon the commission of an act where there was a purpose to do an unlawful act, and he would be in the wrong; he would be entering upon a state of case that he had no right to enter upon (p. 244).

It might be difficult to understand why this portion of the charge was considered as abstract, were it not for a

usage of the word abstract by the profession in that locality, which appears from the very clear definition given by the learned judge in his opinion upon the motion for a new trial in the case of *Hickory* v. *United States*, No. 841 of this calendar, submitted October 19, 1893, at pages 288, 289, and which perhaps ought to be referred to in fairness to the prisoner:

> Now, it is said that the charge is abstract. That means, of course, legally speaking, that it asserts principles that have no relevancy to the case. That is what abstract means. A concrete principle of the law is a principle that is relevant to the case. * * * The practice has grown up here of the court giving to the jury every principle that is invoked, whether that principle is an abstract principle or not, or whether it may turn out to be abstract. That is a question left to them for determination. (*Hickory* v. *United States*, Record, pp. 288, 289.)

The objection here, therefore, seems to be on the ground of irrelevancy, or that there was no evidence to prove the facts which the court was charging that the jury might consider.

If any portion of the passage excepted to is correct, the exception is not well taken. If there is evidence tending to prove any of the facts here assumed, an exception can not be sustained on the ground that there is no evidence tending to prove some one of the other facts referred to.

As to the assumed "understanding to kill Hitchcock," we have stated the evidence under the last heading.

There was sufficient evidence in the case to enable the jury to find that defendant was on an unlawful mission,

that he was prepared to resist arrest and to do an unlawful act. He was armed and never out of the company of Wakoo, whom he admitted to be an escaped convict, and they were partners in the business of introducing whisky into the Indian Territory, a crime against the United States. (Rev. Stat., § 2139, as amended, 19 Stat., p. 244.) This being so, no legal exception can be taken to the court's proposition that he was "entering upon a state of case that he had no right to enter upon." No exception was taken to the immediately following general proposition that "he must be in the right before he can invoke this law of self-defense."

VI.

This is an exception to a very long passage containing numerous propositions on page 246 of the record. No ground is stated. Wakoo was an escaped convict, and the proposition of the court that the marshals had a right, as citizens, to arrest him was, therefore, unexceptionable. (*State* vs. *Holmes*, 48 N. H., 377.) Whether he had been sent to prison for the homicide of which he had been found guilty, or whether he had been sent to the reform school on account of his tender age at the time, can make no difference.

The passage containing at least one correct proposition, it is unnecessary to consider the extracts set out in the brief for plaintiff in error, which, however, seem likewise unobjectionable. The brief claims that the prosecution denied any attempt by either one of the deceased to arrest "anybody," so that "on their theory there can be no resistance to arrest in this case." This is an oversight.

The testimony of Roach, the prosecution's main witness, as well as that of Caywood, based on the parties' statements immediately after the affray, was to the effect that it grew out of an attempt by the deputy marshals to arrest them through mistake of identity.

VII.

This exception, also without any ground stated, is taken to a long passage from pages 244–245 relating to the crime of manslaughter. The passage contains so many correct propositions that it is needless to consider separately the extracts criticised in the brief for plaintiff in error.

Counsel objects because the court "said nothing of the danger of the verdict of murder on a case of manslaughter." It was the duty of counsel to request such a statement if he thought it necessary.

Counsel objects to the remark, "If self-defense does not exist, the only other condition that can exist in the case is a state of murder." The court evidently meant to include unjustifiable as well as justifiable self-defense. There was no evidence tending toward manslaughter, except in connection with self-defense. If the jury were likely to fall into a misapprehension, it was the duty of counsel to ask further instructions.

VIII.

This exception is taken to the action of the court in charging the jury not to find a verdict of manslaughter.

> If you are satisfied from the whole of this testimony, viewed dispassionately, coolly, and deliberately by you as twelve honest and impartial citizens,

> performing your duty under the law, that the defendant is guilty beyond a reasonable doubt, and guilty of the crime of murder, your duty is to convict him of murder. If you are not satisfied to that extent your duty would be to acquit him. (p. 251.)

It is not intended to argue that the paragraph here excepted to is correct; that upon the testimony of Caywood, for instance, the jury might not have had the right to find a verdict of manslaughter.

The error, however, if any, was in a legal sense beneficial and not prejudicial to the prisoner. The court had already given the definition of murder, and charged at considerable length on the definition of malice aforethought. The passage excepted to in the charge was in legal effect that if the prisoner was guilty only of manslaughter, the jury should acquit him. The jury could not logically infer that if he was guilty of manslaughter they might convict him of murder. It was doubtless an inadvertence, but one can not complain of a mistake in his own favor. (*Vicksburg R. R.* v. *O'Brien*, 119 U.S., 99, 103; *Grand Trunk R. R.* v. *Ives*, 144 U. S., 408.)

Moreover, the first proposition in the passage quoted is correct undoubtedly, which neutralizes the exception.

IX.

This exception is to the denial of a request to charge as follows:

> First. Manslaughter is an unlawful and willful killing, but without malice, and is punishable by imprisonment not exceeding ten years, and fine not exceeding $1,000.

> Second. If you believe from the evidence in this case that the deceased were attempting to make an illegal arrest of the defendant, and that the defendant in resisting such illegal arrest, either by himself or in conjunction with his companions, killed the deceased, one or both, then the attempt to illegally arrest the defendant would be such provocation as would reduce the offense to manslaughter, though the killing was done with a deadly weapon (pp. 252–253).

This instruction the court refused to give, stating that the law had been fully charged.

The request, however, was not proper because a most important qualification of the general proposition was omitted. Homicide is murder and not manslaughter, although committed in resisting an illegal arrest, if express malice appears. (3 Greenleaf on Evidence, sec. 123; *Rafferty* v. *People*, 69 Ill., 111, 117; *Roberts* v. *State*, 14 Mo., 138, 146).

There was abundant evidence of express malice in this case.

In Sam. Manus's evidence appears the following passage·

> Q. When Brown said that he killed his man the first shot, did he say where he shot him?
>
> A. Yes, sir; he said he shot him in the forehead.
>
> Q. Which one did he say he shot?
>
> A. Whitehead.
>
> Q. Hampton told you that he shot his man in the belly, and he doubled up and begged?
>
> A. Yes, sir; he looked up and begged, and he said he didn't like to shoot him again, and he said John Brown said to him to shoot him again, and he said

John Brown just jumped around there and whooping, and got to shooting at the man that was begging. Both of them got to shooting at him, he said.

Q. They thought that was Bruner?

A. Yes, sir; that is what Wakoo said. John Brown didn't say that himself.

Q. John was there, though?

A. Yes, sir; he was there.

Q. When Wakoo said that Brown here told him to shoot the man that was begging, and that Brown got to jumping around there and whooping, and that they both fired, did Brown say anything at all?

A. No, sir; he just said Brown told him to shoot; he said he thought Brown was a coward, but he seen that night he was brave; that he whooped and shot.

The COURT. Who said that, Wakoo or Brown?

A. Wakoo.

The DISTRICT ATTORNEY. You say that John Brown exhibited to you $3 in money that night when he came back, and said he had gotten it?

A. Yes, sir; I seen $3 in money.

Q. That he got from Whitehead?

A. Yes, sir. (pp. 97, 98.)

Roach, who was present at the affray, testified as follows:

Q. When you received that shot, what did you do?

A. I started off from there then.

Q. Running or walking?

A. I walked off.

Q. What else occurred there, if anything?

A. I heard somebody holler, and I turned back to see who it was, and I seen John Brown run up to Whitehead and shoot him after he was laying on the ground.

Q. Shot Whitehead?

A. Yes, sir; John Brown shot Whitehead. I seen the blaze run all over him most.

Q. What was it that he said when he hollered?

A. I could not understand what he said; I don't know who it was hollered.

Q. What did he shoot him with?

A. With a Winchester. (p. 113.)

Q. How many times did you see Brown shoot?

A. I seen him once certain; that is the time he shot Whitehead.

Q. When he was on the ground?

A. Yes, sir. (p. 116.)

Nearly all the witnesses testified that Brown exhibited pride and satisfaction rather than any other feeling over his part in the affray.

The fact that the dead men were pierced with nine bullet holes, while the three others received but one wound among them, is certainly some indication that express malice mingled with the self-defense.

X.

This assignment claims "error for the court to adjourn the trial from the court-house provided by law, and continue the trial in another building and place." The record entry is as follows:

It having come to the knowledge of the court that the court room is desired on Tuesday, the 22d instant, by the Government, for the purpose of holding a civil-service examination, it is hereby ordered that the circuit and district courts of the United States for the western district of Arkansas be held on Tuesday, the 22d instant, and as long thereafter as the civil-service examination shall require the United

States court room for a civil-service examination, at the circuit court room of the court-house in Fort Smith, Upper Township, Sebastian County, Ark. (p. 3.)

No objection appears to have been made during the trial to the adjournment. The court explains the reasons for the adjournment more fully at page 259 of the record in its opinion on the motion to arrest judgment. The statute requires the circuit court to be held at the times and places of holding the district court. (Act of February 6, 1889, 25 Stat., 655.) The district court is ordered to be held "at Fort Smith" (Act of January 31, 1877, 19 Stat., 230.) The court room in which the trial was progressing had been selected by an order of the court. It was in the power of the court at any time to make an order changing the place of holding court, provided it should continue to be at Fort Smith.

XI–XIII.

The prisoner claims that it was error to deny his motion for a new trial and his motion in arrest of judgment, and to render judgment and sentence against him.

The motion in arrest of judgment makes no point not hereinabove noticed, except a claim that defendant could not be tried for both murders at the same time, as to which it is enough to refer to Revised Statutes, section 1024. As to the motion for a new trial, we refer again to the brief for the Government in *Hall* v. *United States*; and respectfully submit that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

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